U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 15 March 2004

Case No.: 2003-LHC-0512
OWCP No.: 10-038947

In the Matter of:

GLENN TURNER
Claimant

v.

PITTSBURG & CONNEAUT DOCK COMPANY
Employer

and

SIGNAL MUTUAL INDEMNITY ASSN. LTD.
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest

APPEARANCES:

Steven C. Schletker, Esq.
For the claimant

Gregory P. Sujack, Esq.
For the employer/carrier

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER

This case involves a claim for workers' compensation benefits under the Longhore and Harbor Workers' Compensation Act as amended (33 U.S.C. §901 *et. seq.*)., hereinafter referred to as the Act. Following proper notice to all parties, I conducted a Formal Hearing in regard to this claim on June 4, 2003, in Cincinnati, Ohio.

Administrative Exhibits entered into evidence include: the letter referring the matter to the Office of Administrative Law Judges dated November 21, 2002, (ALJ Exhibit 1); the Notice of Hearing and Preliminary Order dated April 21, 2003, (ALJ Exhibit 2); Claimant's Pre-Hearing Statement (ALJ Exhibit 3); Employer's Witness and Exhibit List (ALJ Exhibit 4); Employer's April 18, 2003, correspondence suggesting Section 8 (f) as an issue (ALJ Exhibit 5); Director's motion in limine to preclude resolution of limitation of liability under Section 8(f), (ALJ Exhibit 6); and Claimant's Response to the Director's motion in limine, received May 28, 2003 (ALJ Exhibit 7); (TR. 5-6).

The parties entered Joint Stipulations, entered as Joint Exhibit 1 and consisting of Claimant's Exhibits 1-43, into evidence pursuant to 20 C.F.R. §702.338. Employer submitted Exhibits 1-3 into evidence without objection and submitted exhibits 4-5 post-hearing. (TR 8). The parties discussed a pending motion from the District Director, a motion in limine, to preclude resolution of the Employer's request for limitation of liability under 8(f).

Unresolved issues from the Stipulations include causal relationship of the hip condition to work performed at P&C Dock, causal relationship of the back condition to work performed at P&C Dock, entitlement to Section 7 medical benefits, Attorney Fees, and the Employer's right to a credit on medical benefits. (TR 10).

The initial issue to be resolved is whether Claimant sustained an injury that now entitles him to benefits under the Act. The Claimant, undisputedly injured on December 28, 2000, while working for the P&C Dock, slipped on ice and suffered an injury to his left knee. He underwent arthroscopic surgery for that injury but the knee condition did not improve. After undergoing extensive physical rehabilitation, he subsequently underwent a total knee replacement. Following the first knee surgery, the Claimant developed pain in his low back and his hip. Since that time, he has also undergone a total hip replacement and lumbar surgery.

The second question centers on whether the back and hip conditions causally relate to the incident of December 2000. These questions affect the Employer's liability for medical expenses and additional compensation. Claimant alleges that the injury to his knee caused or aggravated his hip and back leading to hip replacement surgery and a back fusion procedure.

Stipulations

The parties submitted the following stipulations:

1. The parties are subject to the Longshore and Harbor Workers' Compensation Act (33 U.S.C. § 901 *et seq*.);

2. The Claimant and the Employer were in an employee-employer relationship at the time of the injury;

3. The accident and knee injury arose out of and in the scope of employment;

4. The accident occurred on December 28, 2000, while Claimant was working as a mechanic on the lower coal dock for the Employer and cumulative, repetitious trauma[1] occurred from May 23, 1977 to August 1984 and from December 2, 1997 to December 28, 2000.

5. The Employer had timely notice of the injury;

6. The Claimant filed a timely claim for compensation on July 11, 2001;

7. The Claimant's weekly wage averages $ 1197.06;

8. Employer paid temporary total benefits of $ 795.03 per week from December 29, 2000 to January 19, 2001, and March 7, 2001, to October 28, 2001, and November 9, 2001, to the present.

9. Employer paid medical benefits of $81,134.00 for the knee replacement.

10. Claimant worked light duty after the accident from January 20, 2001 to March 3, 2001 and from October 29, 2001 to November 8, 2001.

11. Claimant is presently unable to resume work at P&C Dock.

These stipulations, admitted into evidence, are therefore binding upon Claimant and Employer. 20 C.F.R. § 18.51; *Duncan v. Washington Metropolitan Area Transit Auth.*, 24 BRBS 133, 135 n.2 (1990); *Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149, 151-52 (1988). Although coverage under the Act cannot be conferred by stipulation, *Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84, 88 (1985) the undersigned finds that the stipulations offered may serve to meet the respective parties' burden of persuasion. The undersigned has carefully reviewed the foregoing stipulations and finds that they are reasonable in light of the evidence in the record. As such, the same are hereby accepted as finding of fact and conclusions of law.

Contested Issues

The unresolved issues include causal relationship of the hip condition to work performed at P&C Dock, causal relationship of the back condition to work performed at P&C Dock, entitlement to Section 7 medical benefits, Section 8(f) relief, Attorney Fees, and a right to a credit on medical benefits. (TR.10).

1 The parties failed to define the term "trauma" and its attendant nature and extent as relates to the instant claim.

Based upon my observation of the appearance and the demeanor of the witnesses who testified at the hearing and upon a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law, I make the following conclusions and findings of fact.

Findings Of Fact And Conclusions Of Law

Background

The Claimant, Glenn Clark Turner, born September 5, 1946, is 56 years old. He is 5' 11 " tall and weighs approximately 205 pounds. He resides at 788 Fairmont Street, Conneaut, Ohio 44030, and has lived in the Conneaut area for over 25 years. Divorced, he has three grown children. (TR. 17-18).

As a twelve year old, he broke his leg in a sledding accident and surgery repaired the fracture. (TR 19). He developed a limp after he started growing following the injury and an elevated heel or insert alleviated the limp. (TR 83). He treated intermittently for the sledding accident until age fifteen but has not treated for any residual condition related to the sledding accident since. He continued to wear lifts to compensate for the resulting leg disparity. (TR 18-19). Claimant stated that the leg disparity amounted to 5/8ths of an inch.

The Claimant graduated from the twelfth grade. His first job out of high school, as a press operator at Conneaut Can, lasted two to three years. Claimant thereafter worked odd jobs until he obtained employment as a press operator at Presque Isle Plastics. Mr. Turner worked at Presque Isle Plastics for approximately eight years until the facility relocated. (TR.18 & 20-21). The Claimant returned to doing odd construction and handyman jobs until 1977, when first hired at the Pittsburgh & Conneaut Dock Company (hereinafter referred to as P&C Dock).

Mr. Turner's Employment at P&C Dock

Mr. Turner completed a thorough pre-employment physical examination with the Employer's physician of choice. After receiving a clean bill of health, P&C offered him a position in the labor pool. (TR.23-24, 29). Claimant worked heavy physical labor at P&C Dock from May 23, 1977 through August 1984, when he was laid off. He, thereafter, worked at construction, odd jobs and as a handy man until recalled to P&C Dock in 1997. Prior to rehire in 1997, the Claimant again underwent a thorough pre-employment physical examination with P&C Dock's physician of choice. Dr. John Meranda found Mr. Turner to be physically fit and approved him without restriction for work at P&C Dock. The Claimant worked various jobs at P&C Dock through the date of accident, December 28, 2000. (TR 57).

At P&C Dock, the Claimant worked at numerous positions including pitman, bleeder, pusher operator, dozer operator, stacker operator, shoveler, the reclaim wheel, hose holder, track repairman, vesselman, extra vesselman, scraper operator, coal stacker

and mechanic. All of these positions required heavy lifting, manipulating heavy equipment, working in awkward positions and climbing. (TR 28, 29, 32, 35, 36, 39, 40, 41, 48, 50, 52, 62). None of the jobs held by the Claimant included sitting down, light duty or sedentary work. The Claimant often performed heavy manual labor during overtime and double shifts. (TR 64). The Claimant testified that he obtained certain qualifications in his employment such as operator of a pusher locomotive and a front-end loader, both types and on various stacker machines at the company. (TR 85-87).

When the Claimant re-hired in December 1997 as a laborer, he bid to work in the machine division. (TR 93). While in the machine division, he underwent additional training on the stackers, a pusher and a bulldozer. (TR 93). He had training on an ore reclaimer, the coal and ore mechanisms, a front-end loader, ore stacker, and training on the #3 stacker. He also had training on the reclaim wheel. (TR 94). There were situations where he would have to do laborer work but most of the time there were laborers around to do laborer work. (TR 95).

Mr. Turner's job duties included working on the equipment responsible for loading and unloading material to the ships, keeping coal from building up in the areas around the pits and the conveyor belts, repetitive sweeping of coal, breaking frozen coal apart with a six feet long pry bar and work with various size sledgehammers. Claimant regularly used a three-inch diameter fire hose, maintained sixty-pound rollers, and manipulated thirty-pound rail clamps. Other duties required him to be on his feet for eight hours or more, move fifty-five gallon drums and sledgehammer open rail car hopper doors. (TR 26, 27, 28, 34, 35, 37, 41, 42, 43, 46).

Claimant's job required twisting, heavy lifting, bending and climbing several hundred feet on conveyors. The P&C work was heavier and more vigorous than work he performed as a construction worker. (TR. 56). During his first and second employment terms with P&C Dock, prior to December 28, 2000, Mr. Turner had no trouble with his back, hips, or knees and never had to ask off any assignment due to pain in his back, hips or knees. (TR 58 & 65).

On December 28, 2000, Claimant Turner, while working as a mechanic on the lower coal dock, received a call from his supervisor. The supervisor, in a remote part of the facility in newly fallen snow and ice, needed antifreeze after overheating the truck engine. Claimant Turner retrieved the needed antifreeze and went to the supervisor's location. The supervisor stopped Mr. Turner approximately 100 yards away from the location of the supervisor's vehicle, informing him the road was impassable by car. The Claimant continued on foot, carrying two buckets of antifreeze. While in route, Mr. Turner slipped on the ice and fell. He landed on his back with his left leg twisted under his body and his right leg fully extended, as if he were "doing the splits". (TR 67-69).

The Medical Evidence

Following the accident, Claimant sought medical treatment on December 29, 2000, at Brown Memorial Hospital Emergency Room. The Claimant experienced

extreme pain in the left knee. Prior to falling on the ice and snow, Mr. Turner had no pain in the left knee. (TR 77). The remainder of his medical evidence follows.

Dr. Farone

On January 2, 2001, the Employer referred Mr. Turner to Dr. Frank Farone of UPMC Horizion Occupational and Environmental Medicine. On January 5, 2001, Mr. Turner underwent an MRI of the left knee at UPMC Horizon Greenville, which showed a possible tear of the posterior horn medial meniscus. (CX 2-2). The Claimant returned to Dr. Farone on January 9, 2001, for follow-up and to review the MRI results. Prescribed a neoprene knee support, he returned to regular duty at P&C Dock. (CX 2-6). Dr. Farone's notes reveal long-term compensatory changes in the left leg.

On January 16, 2001, Dr. Farone treated Mr. Turner for increased pain in the left knee with increased swelling. The left knee gave out several times while at work. Dr. Farone diagnosed a left knee sprain and medial meniscus tear. The Claimant returned to seated, sedentary work with this restriction to remain in place until Mr. Turner orthopedic physician cleared him to return. (CX 2-8). Dr. Farone saw the Claimant again on October 25, 2001, for a return to work examination. The Claimant, given a drug screen and hearing test, returned to work with restrictions of no more than two hours standing or walking per day, no climbing, crawling, squatting, or kneeling. (CX 2-10).

Mr. Turner attempted to return to this light duty work for two weeks but suffered intolerable pain. Mr. Turner rated his pain as an eight to nine with ten being the worst pain level. Dr. Farone's office notes indicate that it hurt Mr. Turner to sit, walk or stand. Claimant presented with severe burning pain, instability in his left knee and complaints of pain in his hip and low back pain radiating to his shoulders. Examination of the back showed moderate tenderness, with increased pain over the trigger points. Dr. Farone ordered an EMG as he was concerned about the amount of pain, apparent instability and functional status of the left knee. (CX 2-11).

Dr. N. Rehmatullah

On January 22, 2001, Mr. Turner saw Dr. N. Rehmatullah for an initial visit. Dr. Rehmatullah kept Mr. Turner on light duty work for two weeks, recommending sit down work only. A second appointment with Dr. Rehmatullah was canceled by P&C Dock.

Dr. Gary Cortina

Referred by the Employer to Dr. Gary Cortina on January 29, 2001, the doctor found Mr. Turner suffered from a hyperflexion injury to left knee. He complained of pain along the medial joint and the peripatellar area. Mr. Turner's pain worsened walking and any climbing aggravated the symptoms. Dr. Cortina took additional x-rays showing medial and lateral joint space narrowing. Acquiescing to the Claimant's wishes, Dr. Cortina allowed Mr. Turner to continue working in a light duty capacity stating, "can work sedentary to very light duty for 2 weeks. No lifting over 10-15 lbs.; no climbing, no

walking on uneven ground; occasional squatting. " Dr. Cortina's records indicated if conservative treatment failed, an arthroscopy of knee joint would be warranted. (CX 5 - 4 & 5).

Mr. Turner saw Dr. Cortina again on February 12, 2001, when Dr. Cortina noted no improvement in the knee. He scheduled Mr. Turner for arthroscopic surgery on the left knee with partial medial meniscectomy and left arthroscopic medial plica excision. (CX 5-9, CX 7-1&2). Mr. Turner followed up with Dr. Cortina on March 15, 2001 and April 10, 2001with complaints of pain in the left calf, after which Dr. Cortina prescribed an aggressive strengthening program to regain strength and motion. (CX 5-11). Thereafter, Mr. Turner participated in physical therapy with Keystone Rehabilitation 135 times from April 13, 2001 to March 22, 2002. (CX 9, 4-68). When the Claimant presented to Dr. Cortina on May 14, 2001, persistently symptomatic, Dr. Cortina ordered an MRI. (CX 5-14).

The MRI showed tri-compartment osteoarthritis of the knee; Grade III chondromalacia patella; Grade III chondromalacia of the medial tibiofemoral compartment; partial surgical resection of the medial meniscus with no recurrent meniscal tear; free edge meniscolysis of the lateral meniscus with no macro meniscal tear; scar formation with ligamentous hypertrophy of the anterior cruciate ligament; scar formation of the lateral collateral ligament; and large volume joint effusion with mild fluid distension of the gastrocnemius-semimembranosus bursa. (CX 5 - 16 & 17). On June 11, 2001 and July 9, 2001, Mr. Turner saw Dr. Cortina for pain and instability in the left knee. Dr. Cortina again prescribed a vigorous strengthening program to stabilize the knee which the Claimant participated in. (CX 5- 20 & 21). Dr. Cortina's office notes from August 10, 2001, indicate that the Claimant suffered from back pain due to his abnormal walk and that he needed an MRI of his back. (CX 5-21).

An MRI of the lumbar spine, performed on September 2, 2001, at Hamot Medical Center, showed borderline central spinal stenosis at L4-5; smaller central disc protrusion; an element of facet arthrosis at this level; and disc space narrowing and spondylitic change at L5-S1. (CX 10-1 & 2). The Claimant saw Dr. Cortina on October 23, 2001, when he continued to exhibit marked atrophy with increased back and buttock pain. Dr. Cortina ordered EMG/NVC testing.

The Claimant returned to work on October 29, 2001, with the same restrictions. Mr. Turner worked with restrictions of sedentary to light duty work, no lifting greater than ten to fifteen pounds, no climbing and no walking on uneven terrain. Mr. Turner treated with Dr. Cortina again on November 19, 2001, with no improvement in left knee pain and increasing pain in the left hip and left buttock. The left hip had decreased range of motion. Claimant tried to return to work but was unable to maintain due to aggravation of his condition. (CX 31).

The Claimant met with very limited success with his physical rehabilitation and therapy despite the fact that he attended 135 sessions in roughly one year. (CX 9). He had hip and knee arthrosis, which developed mostly due to the fact of the malalignment

within the femur and proximal tibia. (CX 5-29, Depo p. 29). Dr. Cortina responded to an inquiry by counsel for the Claimant on March 15, 2002, noting that the Claimant's hip and low back exhibited no problems until after the injury and that the x-rays showed moderate hip arthrosis due to an angular malalignment at the femoral shaft caused by the adolescent fracture. (CX 5 - 35-36).

In a follow up report, the doctor noted that he did not believe the hip and lumbar spine conditions were work-related. He did not believe that the Claimant's "three-year" work history could significantly cause either the degenerative hip or the degenerative lumbar spine condition. He also believed that the Claimant's work activities were medium duty work, not heavy duty work. Dr. Cortina indicated that he did not believe that the work-related injury to the left knee and subsequent treatment for the quadriceps weakness caused either the left hip or low back to flare up. He stated further, "I believe the only work connected ailment that Mr. Turner suffered from during the accident was a meniscus tear…All of the other problems that have subsequently developed are degenerative in nature and were not exacerbated, aggravated or were caused by the injury and certainly were not aggravated, exacerbated, or caused by the treatment, i.e., the knee arthroscopy that the patient underwent." (CX 5 - 37-37a).

However, Dr. Cortina later contradicted these statements in a letter to Claimant's counsel of March 15, 2002. (CX 5-35). There, Dr. Cortina stated that Mr. Turner's gait altered following the knee injury and surgery. He asserted that the alteration in gait "aggravated some left hip arthrosis and also low-back arthrosis the patient had pre-existing the injury." (CX 5-35). Furthermore, Dr. Cortina stated that the knee injury and resultant "quad atrophy" increased the hyperextension deformity. The work conditions, described by Dr. Cortina as heavy and vigorous, probably aggravated the hip, knee, and back conditions in his opinion. This statement contradicted what this doctor stated to the Employer. Of particular importance, Dr. Cortina noted that Mr. Turner had no prior hip or back problems.

Subsequently, Dr. Cortina reviewed Mr. Turner's employment file and work duties. He stated to Employer on September 25, 2002, that he previously believed that Mr. Turner worked for a longer period than three years at P&C Dock. (CX 5-37). He believed that the work duties consisted of medium, not hard labor, and further that Mr. Turner's employment did not "significantly cause" the hip and back conditions. In sum, he did not find that the work-related injury to the knee or its treatment aggravated, caused or worsened the hip and back "considerably." (CX 5-37).

Once again, Dr. Cortina contradicted these statements made to the Employer in a letter to Claimant's attorney dated November 25, 2002. (CX 5-38). After noting that Mr. Turner's employment with P&C Dock included the years from 1977 to 1984 and thus comprised more than three years of labor, he revised his opinion again. First, he noted that the job entailed medium to heavy labor. Second, he stated that this medium to heavy labor could "speed up or hasten" the degenerative process in Mr. Turner's hip and back. Third, he stated "[c]ertainly the job that you have described him performing certainly could lead to hip and back arthrosis over an extended period of time." Mr. Turner saw

Dr. Cortina for the last time on January 11, 2002, where he had continuing complaints of pain in the knee, left hip and low back. (CX 5-33).

Dr. David German

During his treatment with Dr. Cortina, Mr. Turner underwent independent medical examinations at the behest of the employer. On September 4, 2001, the Claimant met with Dr. David German regarding his left knee and back pain. After review of old x-rays and conducting new ones, Dr. German examined Mr. Turner and reviewed the surgical report and information from Dr. Cortina. He believed that the treatment of Mr. Turner's knee injury with a brace caused him to ambulate in a way that he did not prior to the accident. (CX 11-3). Dr. German stated it was "certainly likely he has back pain due to aggravation to some already present arthritis present in low back made worse by altered gait mechanics from difficulties with left knee." (CX 11 - 1-3).

Dr. David Babins

On October 31, 2001, the Claimant received an epidural steroid injection to his back from Dr. David Babins. Mr. Turner received an additional injection on January 23, 2002. (CX 5 - 26, 34).

Dr. Jonathan Park

Starting in January 2002, the Claimant began treating with Dr. Jonathan Park. Mr. Turner saw Dr. Park on January 31, March 11, and March 21, 2002, with continuing complaints of left hip and knee pain along with interrelated lumbosacral pain. (CX 13 - 3&4). The Claimant wished to discuss left total knee replacement with Dr. Seeds and concluded his treatment with Dr. Park on March 21, 2002. (CX 14 - 5&6).

Dr. William Seeds

The Claimant began treating with Dr. William Seeds, board-certified in orthopedic surgery, on January 28, 2002. (CX 38). He felt Mr. Turner had further increased mechanical limitations, which could potentially and significantly affect the Claimant's ambulation and push the situation to the point of recommending definitive treatment of knee replacement. (CX 14- 3&4). On May 2, 2002, Dr. Seeds noted the Claimant was suffering with pain in the medial side of his left knee radiating to the top of his leg and down to his foot with numbness in the foot and dislocation of the knee. Dr. Seeds scheduled surgery and performed a left total knee replacement on June 10, 2002, at Ashtabula County Medical Center. (CX 14 - 5 & 6, CX 15 - 1-77). The Claimant stayed in the hospital for a few days following surgery then began out- patient physical therapy with Keystone Rehabilitation on June 26, 2002. (CX 16-1, CX 17- 2-19). Mr. Turner underwent 42 sessions of post-operative physical therapy ending on October 7, 2002. Dr. Seeds continued to treat Mr. Turner after surgery.

On August 26, 2002, Mr. Turner saw Dr. Seeds with complaints of moderate pain, swelling of the knee for three weeks and continuing back problems. (CX 14 - 10 & 11). On October 8, 2002, Dr. Seeds' notes indicate a total hip replacement would be the next recommended major procedure with fusion of the back to follow. (CX 14- 17 & 18). On October 22, 2002, Dr. Seeds completed a medical report stating the recommended medical procedure for Mr. Turner's condition was total hip replacement surgery. He also offered the opinion that Claimant's hip condition was causally related to a combination of work over the years and the December 28, 2000, work injury. (CX 14-20). On October 28, 2002, Dr. Seeds performed a total hip replacement of the Claimant's left hip with two proximal screws removed from the proximal femur, at Ashtabula County Medical Center. (CX 14 - 29-41, CX 22 - 2-92). Mr. Turner, initially discharged to Austinburg Nursing and Rehabilitation Center, returned home until he saw Dr. Seeds on December 12, 2002, for surgical follow up. On December 18, 2002, Mr. Turner began his third regimen of physical therapy, consisting of eighteen visits, and concluding on January 29, 2003. Mr. Turner's most recent treatment with Dr. Seeds prior to the Formal Hearing was on March 19, 2003. (CX 14- 42 & 43).

The Claimant deposed Dr. Seeds on August 16, 2003, as Mr. Turner's attending physician for the knee and hip conditions. (CX 38-6). Dr. Seeds testified to the presence of a degenerative process and arthritis in the left knee, low back and hip that Claimant's work at P&C Dock aggravated, exacerbated and hastened. Dr. Seeds' impression follows: that his patient had an injury accelerating a pre-existing condition, that the physical requirements at work had "absolutely" aggravated or exacerbated the condition of the knee joint, and that the work accident also caused the knee impairment. (CX 38 - 10-13). Any type of activity that puts significant demand on the joints, such as squatting, lifting and climbing has a direct correlation to increased degeneration of a joint that is in an arthritic process, according to Dr. Seeds. (CX 38 - 8-11).

Stating that the repetitive mechanical work would have a tendency to aggravate and exacerbate a degenerative process he explained:

> [O]nce a joint started deteriorating the joint reaction forces the normal forces that a knee, a hip, any joint that is undergoing a load undergoes is changed. Your knee is built a specific way to withstand and spread that load out. Once a part of that knee starts to deteriorate, then the load concentrates in that specific area, thereby increasing that load and that joint reaction force and accelerating the wear and tear of that area. It's all predictable. (CX38-11).

In his opinion, the December 28, 2000, work accident was a cause of impairment in the knee that ultimately required the total knee replacement. The medical plan for Mr. Turner was to treat the knee and then move to the hip and back. (CX 38-12). Dr. Seeds testified that the manual labor performed at P&C Dock Company would also have aggravated or exacerbated the condition in Claimant's back:

> It's just another form of repetitive motion, stress to a specific joint. Once the spine – once the mechanics of the spine have changed , it's the same kind of process. It is a continual process that, especially associated with other problems, you can even exacerbate or accelerate other problems. They circle around each other. If the mechanics of the knee are off, that can affect the mechanics of the hip and that can affect the mechanics of the back. It is all related. (CX 38-13).

Furthermore, he stated that Claimant walked with an antalagic gait, certainly related to his knee and related to his hip and his spine, which aggravated the hip and back conditions due to the altered mechanics of ambulating. (CX 38 - 13 & 14). On October 8, 2002, Dr. Seeds saw Mr. Turner for surgical follow-up. There was concern regarding the significant quadriceps changes that evident in the EMG study done by Dr. Clunn. The EMG showed definite atrophy of the proximal muscle area. These changes led to a study of the hip showing severe degenerative changes which Dr. Seeds attributed to aggravation or exacerbation by the repetitive, heavy and cumulative work at P&C Dock. (CX 38 - 15-17).

Following the total knee replacement and follow up care, the hip treatment began. After extensive evaluation, Dr. Seeds performed total hip replacement procedure on October 28, 2002. It is the opinion of Dr. Seeds, as Claimant's primary treating physician, that the work accident of December 28, 2000, the resultant alteration of gait, and the heavy labor Mr. Turner performed at P&C Dock over the years contributed to the need for the total hip replacement. (CX 38-17)

This treating surgeon would not release the Claimant to return to his previous employment at P&C Dock. He placed restrictions on bending, stooping, lifting, prolonged sitting and standing. (CX 38-21). Incomplete rehabilitation of Mr. Turner's hip and back prevented the surgeon from determining an AMA impairment rating. (CX. 38-22). The doctor elaborated:

> As I indicated before, it is his ability to continue adjusting to all these factors together. We have changed the way he walks, we have changed the mechanics of the way he walks, we changed the length of his leg, we changed the mechanics of his spine. So all those things together make it a complex issue. (CX 38-37.)

The doctor opined that such activities as squatting, lifting, and climbing affect every joint depending on the activity and that the Claimant's work activities could have exacerbated or aggravated the condition in the back. (CX 38 - 8-13). Dr. Seeds opined that the repetitive work the Claimant performed would have aggravated or exacerbated the condition of the hip. (CX 38-15). The doctor asserted that the alterations in gait and ambulation would have contributed to the total ultimate condition requiring the left hip replacement. He believed that the heavy labor aggravated the condition in the back. (*Id.* at 18). The doctor believed the Claimant was capable of performing sedentary work with

a sit/stand option. (*Id.* at 34-35). The restrictions would be the same as those he would impose on the Claimant because of the total knee. (CX 38-35). Any restrictions on his ability to work would be the same, whether it was for the hip, the knee, or the spine. (CX 38-36).

The Claimant continued to treat with Dr. Seeds as of the hearing date. With stable knee and hip replacements, Mr. Turner continues to recuperate from the spinal fusion. Claimant needs to work on strength, conditioning and acclimating to a new type of mechanics and gait. (CX 38-20). Dr. Seeds testified that Mr. Turner's physical condition must be viewed as a whole because the hip replacement surgery and the back fusion procedure affect the knee rehabilitation. (CX 38-21). Proper rehabilitation on the knee and hip will not be possible until the back condition reaches maximum medical improvement, according to this physician.

Dr. Amy Clunn

On July 19, 2002, Mr. Turner had an appointment with Dr. Amy Clunn for evaluation of his recurring back pain. Dr. Clunn attained board certification in the field of Physical Medicine & Rehabilitation. At the time of her treatment of Mr. Turner, Dr. Clunn served as a staff physiatrist at the Ashtabula Clinic, the Rehabilitation Medical Director at Ashtabula Medical Center and the Rehabilitation Medical Director at Ashtabula County Nursing Home. (CX 36-4).

Mr. Turner gave a history of back pain occurring on December 28, 2000, and greatly exacerbated by April 30, 2001. (CX 36-6). The doctor noted a scoliosis, concave to the right. (CX 36-7). The Claimant's antalgic gait led to limping on the left side. The doctor noted the Claimant gave a history of his back pain occurring completely after the left knee trauma and believes that the Claimant's work exacerbated a prior condition. (CX 36 – 10-11). The doctor alleged that the Claimant needed a fusion of the lumbar spine. (CX 36-20). She believed the Claimant's work activities aggravated the condition requiring the surgery. (CX 36-21).

A physical examination on July 22, 2002, revealed a malalignment of the spine at the level of the iliac crest indicating left leg discrepancy, pain with flexion and extension, poor strength in the left lower extremity, gross atrophy of the left leg, an effusion to the left knee grossly, and tenderness at the left sacroiliac joint, the left lumbosacral paraspinal muscle and the gluteus maximus muscle on the left. Observation showed an antalgic gait with limping on the left. (CX 36 - 5-8). Tests conducted include deep tendon muscle strength, reflexes, straight leg raises, and for muscle tone and muscle bulk. (CX 36 - 8 & 9). Based upon her examination and assessment results, Dr. Clunn opined that Mr. Turner's condition was degenerative disc disease and spondylolisthesis.[2] (CX 36 - 9 & 10).

2 Spondylolisthesis is a forward displacement of a lumbar vertebra, especially on the sacrum, with consequent contraction of the pelvis.

At the next date of treatment September 6, 2002, Dr. Clunn reviewed the EMG performed in November 2001, to determine if any new nerve damage had occurred. (CX 36-14). She ordered an EMG, performed on September 6, 2002, indicating past neuropathy involving nearly the entire left lower extremity with active denervation in the left thigh muscle revealing recent nerve damage in the thigh muscle. (CX 36-15). She testified "[t]here was old damage in that thigh muscle as well as old nerve damage in the thigh muscle. However, there was also more recent nerve damage in that thigh muscle and I can tell that per the EMG." (CX 36-16). The EMG showed an abnormal study. According to Dr. Clunn, the past nerve damage could be from many etiologic factors, including the spondylolisthesis and stenosis or plexopathy. The more recent damage in the vastus medialis is likely from femoral nerve trauma with his leg injury and surgeries. (CX 18 - 13 & 14).

The doctor noted a grossly obvious leg length discrepancy of at least one inch. (CX 36-27). The doctor would expect that scoliosis resulting from leg length discrepancy would not be unusual. She also stated that the scoliosis would result in a degenerative condition in a person's spine. (CX 36-28). The doctor opined that the work activities would aggravate the spondylolisthesis. (CX 36-36). She stated this would be a cumulative effect.

The doctor believed the Claimant's complications from leg length discrepancy would be developing scoliosis and excess pressure on joints, including the facet joints of the posterior spine at L4-L5 and L5-S1. (CX 36-40). It would be reasonable to assume that the degenerative process weakened the structures of the lumbar spine. (CX 36-41). Dr. Clunn testified that she did not think a leg length discrepancy or scoliosis could account for all the problems in Mr. Turner's back and she believed that the nature of his work would either cause or aggravate his spondylolisthesis. (CX 36-36). Work activities contributing to the Claimant's condition would include lifting sledgehammers, walking over unsteady equipment, hazardous footing on uneven ground, landing on and off machinery and the December 28, 2000, work accident. (CX. 36-36). Dr. Clunn reviewed the results of the MRI and EMG with Mr. Turner noting continued back and left leg pain with widespread atrophy and leg length discrepancy.

On October 7, 2002, Dr. Clunn examined Claimant Turner, again finding decreased left iliac crest height with decreased strength on hip flexion. Dr. Clunn determined the Claimant needed further evaluation for his back condition. (CX. 36-20). Dr. Clunn authored the following opinion:

> I believe within a reasonable degree of medical certainty that it [the work at P&C Dock Company] did exacerbate his previous condition of femoral fracture and trauma in the left leg which was a pre-existing condition years ago. Mr. Turner stated that he had no atrophy of the left lower extremity prior to his injury of December 28, 2000. Currently, his degree of atrophy is definitely remarkable. He really has no other history of back pain except for a mild

sprain/strain type injury in 1995 which was self-limited and from which he recovered fully. (CX 36-11).

She believes the nature of the work performed at the dock company, repetitive lifting and bending and physical labor, would aggravate the spondylolisthesis and degenerative disc disease as would the antalgic gait. (CX 36-12). Dr. Clunn testified that decreased strength in the left leg due to knee surgery would aggravate or exacerbate the Claimant's underlying conditions. The quadriceps weakness resultant from the December 2000, work accident would cause instability of the knee, which would then cause strain on the low back. (CX 36-13).

Dr. Lewis Nettrour

On December 13, 2001, Dr. Lewis Nettrour examined Claimant. His impression of the Claimant's knee at that time was a contusion to the left knee and a probable tear of the posterior horn of the medial meniscus. He noted the Claimant's pre-existing leg injury. He believed recovery would be slower than normally expected. (EX 2-30). The doctor saw two possible courses of treatment: first, a vigorous work hardening program and second, a total knee replacement. (EX 2 - 31-32). The doctor felt that if the hip continued to remain uncomfortable, total replacement would be necessary. (EX 2-33). He thought the Claimant had severe longstanding degenerative changes in the lumbar spine, primarily at the last two disc spaces. *Id*. His records indicate "prognosis of returning to previous work is guarded; will benefit from a left total knee arthroplasty" and "with this, I would not recommend returning to any job description greater than light duty with improved gait and left knee function, low back symptoms will probably improve." (EX 2 - 15 & 16).

Upon examination, the Claimant walked with antalgic gait, and had tenderness about the lumbosacral spine with limited range of motion. (EX 2 - 18 & 19). The left hip had "markedly limited" motion. (EX 2-20). Dr. Nettrour, a board-certified orthopedic surgeon, stated that with the medical findings, back surgery could be indicated dependent upon the pain level of the Claimant. Dr. Nettrour agreed that the alteration in gait caused by the December 28, 2000, work accident was a likely culprit in bringing pain to the previously asymptomatic hip and back. (EX 2-52).

Regarding ten years of performing medium to heavy labor, Dr. Nettrour stated that it would cause the symptoms to become more symptomatic.... "Another way to phrase that would be if he didn't do the heavy work, he would be less symptomatic as he got older." (EX 2-56). Dr. Nettrour had not seen any evidence of any medical record or any co-worker testimony that suggested in any way that Mr. Turner had any problem with the hip or back prior to December 28, 2000. (EX 2-57). Dr. Nettrour agreed that if someone walks in an awkward way he can increase the pain in the hip and back. (EX 2-62). He noted restriction of flexion in the lumbar spine. (EX 2-64).

The assumption that the Claimant was without previous symptoms would indicate that his work injury made him symptomatic. (EX 2-67). Examination of the left hip

indicated severe restrictions of motion. (EX. 2-68). Dr. Nettrour's examination of the Claimant revealed no signs of malingering. (EX. 2-74). Dr. Nettrour conceded that it was "fairly likely" that the work injury or the residuals in ambulation and gait may not be the major contributing factor, but would have aggravated the condition. (EX. 2-77).

The doctor alleged the Claimant's need for a total knee replacement was causally related to the original injury of December 2000 and that the lumbar surgery could have been medically indicated. (EX. 2-36 & 37). However, he opined that the work injury and lumbar condition were not causally related. (EX. 2-38). He did believe that the post-injury condition could have temporarily increased the low back pain. (EX. 2-39). However, when the Claimant would have had improvement in his knee function, he believed the back condition should have improved as well. (EX. 2-40). The doctor, when asked to assume that Dr. Blatt had found an increase in degenerative changes, indicated that he did not believe that the increase in lumbar degeneration was related to the post-traumatic condition of the Claimant's knee or the post-surgical condition of the Claimant's knee. (EX. 2-43). The doctor did not believe that the limping would cause the rapid increase in the degenerative changes. The doctor opined that the Claimant's hip condition was not causally related to the accident of December 2000. (EX. 2-45).

Instead, he contemplated the source of the degenerative changes in the hip as taking place over many years based on the deformed thighbone existing below the hip. (EX. 2-46). The doctor further indicated that the post-surgical condition of the Claimant's leg was not causing an increase in the degenerative changes in the hip. He did not think the hip symptoms were related to the knee injury, or the way that he walked afterwards as far as causing any permanent change, however, he acknowledged that it could have caused a temporary uncomfortable feeling. (EX 2-48).

The doctor pronounced the total hip condition not caused by, or the result of, the post-surgical condition but rather necessitated by the degenerative changes present within the hip itself. (EX 2-49). The doctor also maintained that the low back condition occurred independently of the knee injury. (EX 2 - 49-50). The doctor further believed that Dr. Blatt's opinions were consistent with his. (EX 2 - 51-52). Asserting that the information from the Claimant's x-rays at Brown County Memorial Hospital in February 1995, were consistent with the information he previously reviewed, he bolstered his conclusions. (EX. 2 - 52-53). The doctor admitted that the Claimant's awkward gait increased the pain. (EX. 2-52). Lastly, he indicated he believed the Claimant's manual labor could increase symptoms but would not hasten a degenerative process. (EX 2- 55-56).

Dr. David Blatt

The Claimant began treating with Dr. David Blatt, board-certified in neurosurgery, on September 30, 2002, for complex problems with his back and poor range of motion in his hip. (CX 20-1) Dr. Blatt ordered new lumbar films, an MRI of the pelvis, and a return visit after the testing was completed. (CX 20 - 10-12). Mr. Turner followed up with Dr. Blatt on October 17, 2002, when testing results showed grade 1 spondylolisthesis at L4-5 and severe degenerative disease at L5-S1 with facet arthropathy at both

levels. (CX 20-14). Dr. Blatt reviewed the MRI done at Hammet Medical Center previously and compared it to the one he ordered. (CX 37-11). In his opinion, the two MRIs evinced a progression of the degenerative disease in the spine. *Id.* On January 30, 2003, and February 7, 2003, Dr. Blatt treated the Claimant and determined that the back condition necessitated surgery.

On February 12, 2003, Dr. Blatt performed an L4 and L5 laminectomy[3] with removal of abnormal facet and bilateral foraminotomies, pedicle screw instrumentation, L4/5 S1, harvest of right iliac crest bone graft and stealth image guidance. The surgery revealed severe bilateral foraminal stenosis[4] and nerve root compression at L4 and L1 with evident synovial cyst formation with both laminae floating. (CX 25- 1-6).

The doctor opined that the Claimant's performance of heavy or medium manual labor "over the course of say 5 to 10 years" can aggravate the spondylolisthesis shown on the MRI films and could also have a tendency to aggravate degenerative disc disease. (CX 37 - 10-12). The doctor suggested that the condition could have been related either to the initial injury or the knee surgery exacerbated it and that he may be able to recover. (CX 37-11). The light, medium and heavy work conducted by Mr. Turner from May, 1977 thru August, 1984, and December, 1997 thru December, 2000, could aggravate his pre-existing condition according to Dr. Blatt. *Id.* The doctor opined that it was hard for him to say that the problems relating to the leg injury could exacerbate the back problem. The doctor noted that if walking or other functions were changed, "it could perhaps --- it can exacerbate an ongoing back problem." (CX 37-19). Stating:

> [I]t's hard to me to say for sure, but any problems related to the leg is affecting his ambulation and mobility, you know can exacerbate a back problem. It's (sic) just hard to say to what degree not examining him myself earlier on. (CX 37-19).

The doctor noted in Mr. Turner's history the back and neurological leg pain developed after the first knee surgery in March 2001, according to Dr. Clunn's report, findings on exam, and the Claimant's statements. (CX 37-21). When asked about the delayed onset of back and hip pain, the Employer's attorney and Dr. Blatt had this exchange:

> Q: Do you see any significance, doctor, in the apparent delay between the original injury and the onset of lumbar complaints?
>
> A: The lumbar complaints – or the patient says were not present at the time of the initial injury which goes against there being a back injury initially.
>
> Q: [I]f this knee injury disabled Mr. Turner can you assume that?

3 A procedure used to excise the posterior arch of a vertebra.

4 A narrowing or contraction of a passage.

A: Yes

Q: If he didn't have back complaints at the time of his knee injury what happened from the time of the knee injury until the onset of these lumbar complaints if he wasn't working?

A: I can't say for sure. It could either have been exacerbated by the problems he was having with his leg or something could have been pushed over the edge with his surgery or with therapy thereafter. Or it could have progressed on its own. (CX 37 – 28-29).

The doctor admitted that the shortened femur resulting from the sledding incident would increase the possibility of difficulties with that leg and problems with his back. (CX 37-22). He also believed it to be an exacerbating cause of the Claimant's spondylolisthesis but not "*the* cause" and also not a competent cause of the spinal condition. (CX 37-23, emphasis added). The leg length differential would be an additional stressor on the Claimant's nerves affecting the symptoms of the degenerative condition but would not necessarily affect the spondyliothesis according to Dr. Blatt. (CX 37-24).

The doctor also noted synovial cysts, consisting of an overgrowth of the synovium on the facet joints of the back and are degenerative conditions. During the course of care and treatment, they enlarged or became more prominent. (CX 37-25). The bilateral synovial cysts contributed to Mr. Turner's nerve impingement yet only the left-sided cysts impact him for pain. (CX 37 – 25-26).

The doctor agreed that the duration of the subject employment would be a factor to consider. This would also be true of the nature of the activities involved. (CX 37-33). Dr. Blatt agreed that the fact that Claimant did not have five to ten years consecutive employment with P & C Dock would affect his opinion. (CX 37-35). The doctor further testified that for some reason the Claimant's symptoms appeared to be exacerbated after the accident, "but what the degree of correlation [between the accident and the symptoms] is I really don't know what caused what. I can't say. I can just say he got worse. I know he got worse. Why he got worse I don't know." (CX 37 - 38-39).

When asked about Mr. Turner's ability to return to work, the doctor replied that the back surgery alone necessitated a convalescing period limited to light work for about four months with maximum medical improvement not achievable for at least a year. (CX 37 – 17, 20).

Dr. Thomas

The Employer also called Dr. Thomas. (EX 4). The doctor examined the Claimant on two occasions, the first on May 21, 2002. The doctor noted that the sledding incident caused a valgus deformity, commonly called being knock-kneed. (EX 1-16). The doctor's examination showed a recurvatum in the left knee, an antalgic gait, obvious atrophy of the left lower extremity with decreased range of motion and pain in the left

hip. (EX 1-20). Dr. Thomas testified Mr. Turner was a suitable candidate for a left total knee replacement and that the knee replacement was causally related to the December 28, 2000, work injury. (EX. 1-25).

The doctor reviewed x-rays taken over the course of 1 and 1-1/2 years. He did not see any evidence of the progression in the degenerative changes in the left knee and no evidence of loss of joint space or a change in the deformity, such as an increase in the amount of valgus alignment. (EX. 1-23). The doctor opined that the Claimant had a pre-existing condition, with a left knee sprain superimposed upon the pre-existing deformity and degenerative arthritis in the left knee. (EX 1-24). While the Claimant believed he noted an increase in the deformity, this was likely due to the increased atrophy in the left leg, including the calf and thigh. He believed at that time the Claimant was an appropriate candidate for the total knee replacement on the left side. (EX 1-25). He further held that the total knee replacement was causally related to the injury. The doctor also noted his evaluation of the Claimant's back and hip, including his review of the diagnostic films. (EX. 1-27-28).

The doctor believed the Claimant had significant degenerative changes in the lumbar spine and the left hip. He opined they were not caused by the incident of December, 2000. It was also the doctor's opinion that the left knee surgery or post-surgical condition aggravation did not cause these changes but instead they resulted from the normal aging process. (EX 1-29). He saw no evidence of an injury to the low back or hip resulting from the knee injury. The doctor believed the x-rays identical from August 2001, to March 2002. He would have expected to see a change in the condition of the lumbar spine. The doctor also opined that the Claimant's work did not aggravate, exacerbate, or accelerate the pre-existing conditions in the lumbar spine. (EX 1- 30-31).

The doctor further adjudged that had the Claimant's work activities created cumulative trauma in his low back, it would have been reasonable to see symptoms in the hip and low back at the time of the knee injury. (EX 1-31). The fact that the Claimant expressly declined having symptoms in his back and hip at the time of the December 2000, injury would suggest that the Claimant's work activities did not cause or aggravate the pre-existing condition. (EX 1-32).

Dr. Thomas saw Mr. Turner a second time on April 15, 2003. The doctor noted the Claimant had undergone three surgeries and believed that the surgeries to the knee, hip, and low back were medically indicated. (EX 1 – 33-35). The doctor indicated the Claimant's knee condition was consistent with the normal post-operative course for a left total knee replacement. (EX 1-36). The doctor noted that the Claimant wore a clam shell brace, as appropriate for the surgery performed on the lumbar spine. He believed it would be a minimum of three months for the Claimant to wear the brace. (EX 1-37).

The doctor discerned improvement of the Claimant's atrophy in his leg with a minimization of the leg length discrepancy. He observed correction of the recurvatum and the valgus deformities. (EX 1-38). The doctor noted normal range of motion of the left hip for someone who had undergone a hip replacement surgery. (EX 1- 39-40). As

the Claimant was only two months post-surgery to the lumbar spine, he did not conduct a physical examination of the spine but elicited subjective complaints instead. The Claimant reported his radicular complaints significantly improved and believed that the back was doing satisfactorily. (EX 1-42). The doctor thought the Claimant had a good result from the knee surgery, with the previous deformities corrected and atrophy improved. He believed the Claimant had reached maximum medical improvement as to the left knee. (EX 1-43).

Dr. Thomas did not feel the Claimant was able to return to his original employment. He understood that the work activities involved walking on uneven surfaces, climbing, and exposure to cold weather. He believed these would permanently disable him from his job because after a replacement, the knee lacks the appropriate nerve endings or sensation to allow the leg to accommodate for the various conditions. (EX 1-44). He believed the Claimant had suffered a 30% impairment to the left leg under the AMA guidelines, Fifth Edition. (EX 1-45).

The doctor opined the Claimant had an excellent result from the hip surgery. (EX 1-47). He did not believe that the hip surgery would restrict him any further than the restrictions already based on the knee problem. (EX 1- 47-48). He believed that the hip surgery had reached maximum medical improvement. However, it was too early to identify a date of maximum medical improvement for the lumbar spine. He would expect the spine to improve until February 2004. (EX 1-48). The doctor also believed the Claimant temporarily and totally disabled as a result of the recent lumbar surgery. (EX 1-49). Mr. Turner noted that he lacked full flexion of his left knee which he had prior to the knee replacement surgery. (EX. 1-35). The Claimant also noted some discomfort at the lateral aspect with any prolonged walking and used a cane for long walks. (EX. 1-36). Dr. Thomas believed that Claimant could not return to his regular employment at P&C Dock. (EX. 1-43). He stated:

> The knee replacement lacks the normal nerve endings or appropriate section to allow the leg to accommodate for those things. Plus they may cause early wear of the prosthesis. In other words, for example, it's not recommended that people go back to the high impact type of activities after a knee or hip replacement. (EX. 1-44).

With reference to the impairment flowing from the knee/lower extremity, Dr. Thomas opined the Claimant had fifteen percent (15%) permanent partial impairment for the whole body and a thirty-seven percent (37%) impairment rating for the left lower extremity. (EX 1-45). However, Dr. Thomas admitted under cross examination that the focus of the June 19, 2002, examination was a second surgical opinion on the left knee and not for the hip and back. (EX 1-53). Dr. Thomas was not able to identify any proof that suggested Mr. Turner had problems with the left knee, hip or back prior to the December 28, 2000, work accident. (EX 1-57). He further confirmed that in his practice, patients who had trauma or injury triggered previously asymptomatic degenerative conditions into being symptomatic.

Dr. Thomas agreed the work accident of December 28, 2000, was one of the causes requiring the March 6, 2001, arthroscopic surgery performed by Dr. Cortina, that it contributed to the Claimant's antalgic gait, and led to Mr. Turner's total left knee replacement. (EX1-64). Lifestyle changes for the Claimant include post-surgical restrictions. (EX1-66). Mr. Turner does have restrictive range of motion in his hip. (EX1-78). His permanent restrictions, exclusively for the left knee/left lower extremity, include no lifting over twenty pounds, no carrying over twenty pounds, no standing more than one hour per day and no walking more than two hours per day. (EX 1- 79 & 80).

The doctor's work activity restriction, identified as Exhibit #2 to his deposition, indicated the Claimant could perform full-time sedentary or light duty work. This restricttion applied only to the left knee. However, the left hip condition would not alter the imposed restrictions. The doctor further stated that the Claimant's pre-existing degenerative conditions in his lumbar spine and hip would not have been a cause for the alteration of his work activities until the Claimant became symptomatic. Admitting to a temporal relationship between the post-surgical condition and the onset of the back and hip problems, the doctor believed it indicated no cause, as it was merely a temporal relationship. The doctor saw no other factors that would correlate to any causal relationship. (EX 1-86).

Claimant's Testimony

The Claimant confirmed that before the accident he had no problems with his low back. (TR 102). He did have normal fatigue from working. He agreed he did not have any problems that caused him to miss work because of his low back. This was even though he did strenuous activity that would cause his muscles to ache. He stated in comparison to the pain he had that caused him to need the surgery, he "had no pain like that whatsoever prior to the injury." He also agreed he had no such problems with his hip. (TR 103). He had no problems to the extent that he would have called off work and did not recall having sought any care or treatment for his back or hip. From the first employment, 1977 thru 1984, he did not have any pain that made him need the hip surgery, back surgery, or the knee surgery. (TR 104). The same was true from the time he started in December, 1997 until December, 2000. He also agreed that before the accident he did not have to have the back surgery, the hip surgery, or the knee surgery. (TR 104-105). The problems he had in his back and hip could have started at the time of his knee injury, but they did not start before his knee injury. (TR.106).

Working Conditions at P&C Dock Company

Mr. Richard Hill

Mr. Richard Hill testified at the formal hearing. Mr. Hill worked for P&C Dock for twenty-four years and six months until his retirement. (TR 109-110). The witness worked with Mr. Turner on a daily basis and described him as an excellent worker with no knee, hip or back problems. (TR 111). Mr. Hill described job allocations as day-to-

day, based upon the available positions and the seniority held by the personnel present on each shift. (TR 113). All the jobs at P&C Dock are physically demanding. (TR 114-118). Approximately forty people were laid off from P&C Dock in 1984. Mr. Hill testified that Mr. Turner was one of three persons specifically requested for re-hire by the foreman in 1997. (TR 120). There are no light duty jobs at P&C Dock. (TR 120-122).

Mr. Gerald Lane

Mr. Gerald Lane testified via deposition on May 16, 2003. Mr. Lane retired from the P&C Dock with thirty-six and a half years on the job and performed as operations foreman for the last twenty-six years of his employment. (CX 39 - 3 & 31). When Mr. Turner rejoined P&C Dock in 1997, Mr. Lane supervised him in the maintenance division. Supervisor Lane testified that, prior to Claimant's December 2000, work injury, Mr. Turner did not complain about pain or problems in the hips, knees or back. Prior to the work injury, Mr. Lane does not recall the Claimant ever asking for help or to be relieved from a work assignment because of pain or problems with his knee, hips or back. (CX 39 - 4 &5). Mr. Lane described Mr. Turner as a good, hard worker. He held the position of laborer that included climbing, shoveling and hosing. (CX 39-7).

Mr. Lane testified that Mr. Turner's first period of employment would have been during the time when huletts were used at P&C Dock. Working on a hulett involved shoveling, operating the scrapers, cable repair and general maintenance. (CX 39-8). Laborers also performed track repair involving driving and pulling spikes, driving rails and moving railroad ties. Laborers routinely handled material and equipment weighing seventy-five to one hundred pounds. (CX 39-9). Mr. Lane explained that assignment of the most physical jobs goes to those with the lowest seniority.

Mr. Turner frequently worked the position of pitman, which involves opening railroad car doors by hitting them with a sledgehammer, a difficult job all the time. (CX 39-12). In the summer, crews opened approximately 200-250 cars per shift, each with three to four doors per side. (CX 39-12). In the winter, the pitman would have to pry the doors open then pick at the frozen coal with a pointed bar. Mr. Lane testified that on a bad day, sometimes only five cars would get unloaded per shift. (CX 39-13). This supervisor detailed the responsibilities of a head pitman as switching cars due to different cuts, lining the manual switches, and in bad weather having to free the switches with six feet long bars. (CX 39-15). A person might be a laborer on one shift and a ship loader the next shift depending on who was present. (CX 39-16). The position of vessel man required the worker to go into the cargo hold to shovel ore. The vessel man handled cables that fastened Great Lakes vessels to the dock. Mr. Lane described the heavy work as " it was either pull or get pulled in." (CX 39 - 17&18). The scraper position involved working in the cargo hold or loading dump trucks.

Supervisor Lane stated this was a job with lots of "bouncing and flipping around" over rough terrain, as well as being responsible for the maintenance of a piece of equipment by checking oil, fuel and hydraulic oil. (CX 39-18). Mr. Lane described the position of pusher as physically demanding due to climbing up and down a locomotive all

day, lining the manual switches and pushing the railroad cars up to the lower coal dock. (CX 39-20). He described working on a coal stacker as physically demanding because when not in operation the stacker had to be cleaned. The cleaning the stacker takes using shovels and hoses for a couple hours at a time and climbing out onto the boom and the conveyors. (CX 39 - 21 & 22). The ore dock master stacker climbed eight flights of stairs to get to the operator's cab and then used a shovel and hose to clean equipment. (CX 39-22).

The Claimant rehired in 1997, under Mr. Lane's supervision, and according to him, Mr. Turner "was a very good worker." (CX 39-23). Mr. Turner worked for him on the number one and number two stackers and never had any problems stating, "He always handled his job." (CX 39-24). Mr. Lane confirmed the Claimant worked positions as a stacker, pusher and bulldozer operator, all of which are physically demanding. (CX 39-24). Mr. Lane further stated that dozers are demanding because one had to climb up and down them, with a lot of bouncing around while pushing coal back during dumping or pushing it forward for loading. Mr. Lane concluded his testimony regarding the bull-dozers by saying, "you can get the hell beat out of you, depending on who's been on the dozer all day." (CX 39-25). Mr. Lane confirmed that while working as a stacker, pusher or dozer operator, Mr. Turner was subject to being called out as a laborer or mechanic at any time. (CX 39-25). This witness interprets heavy manual physical labor as bull work, climbing, shoveling, hosing and bending. (CX 39 - 38 & 39). Mr. Turner often worked extended or double shifts with Mr. Lane working as the Claimant's supervisor on a regular basis until the time of the accident. (CX 39-40).

Mr. William Webster

Mr. William Webster testified via deposition on May 16, 2003. P&C Dock employer Mr. Webster for approximately thirty-three years until his retirement. For the last twenty-five years of his employment, Mr. Webster worked as operations supervisor overseeing pit crews, the stacker operator, reclaim wheel operators, bulldozer operators and the laborers. (CX 41-5). During both of Claimant's employment terms, Mr. Webster worked as his supervisor and regularly observed his job performance. Prior to the work accident of December 2000, Mr. Webster does not ever remember Mr. Turner complaining of difficulty with his knee, hips or back. The Claimant never required special assistance to perform his job duties. (CX 41 - 5 & 6).

Mr. Webster testified the physical positions of laborer and pitman jobs required the worker to drag fire hoses, lift, crawl, climb, and shovel. (CX 41-6). In the summer, it usually took three or four hits with a sledgehammer per door to open hopper doors and even more hits as it got colder. The cars, unloaded three cars at a time, took five minutes to unload one set of three cars. (CX 41 - 13-15). Mr. Webster testified that employees are subject to job changes on a daily basis because there are no permanently assigned positions. All the jobs require physical, manual labor. The lightest duty job in the yard, the stacker operator, even entailed climbing, shoveling, sometimes working on the belts, inspecting the machinery and using a fire hose. (CX 41 - 7 & 8).

The Claimant, frequently assigned as a mechanic, conducted belt inspection, climbed up and down ladders, and repaired minor breakdowns. Replacing rollers was another job duty of a mechanic, which entailed burning the roller off with torches dragged from under the belts. Supervisor Webster testified that the Claimant had been a bulldozer operator and scraper operator both involving vibrations, jostling and noise. (CX 41-9).

Mr. Louis S. Nardi

Mr. Louis S. Nardi testified via deposition on May 16, 2003. Mr. Nardi is an electrician for P&C Dock Company. He was hired April 2, 1970 and has been employed there for thirty-three years. Mr. Nardi began in the labor pool at the P&C Dock Company and then became an electrician. As an electrician, Mr. Nardi performed duties throughout the Dock Company facilities. On regular occasions, he observed Claimant Turner performing his assigned jobs. (CX 40-4). Mr. Nardi testified that prior to the December 2000 work accident, he never knew Mr. Turner to have any problems with his hips, back or knees. Mr. Turner never asked off an assignment and usually was out longer than anyone. (CX 40 – 5 & 6). The physical requirements of the labor pool include running a fire hose to clean the equipment, going down in the pits, shoveling under conveyors and handling scrap iron from rail cars weighing up to eighty pounds. (CX 40 - 7 & 8). Laborers performed track repair involving tapping in ties, raising track and jacking track up. Mr. Nardi confirmed rail repair was strenuous, heavy work and any part of the facility might need bull work done.

In sum, the evidence presented by the parties and the testimony at the hearing, establishes that Claimant's position entitled heavy, arduous manual labor and I hereby make this finding.

DISCUSSION AND APPLICABLE LAW

In considering a claim for disability benefits under the Act, there are four stages in the resolution of the claim. First, the claimant must show that he sustained an injury. *Bath Iron Works Corp. v. White*, 584 F.2d 569, 574 (1st Cir. 1978). Second, once an injury is established, a presumption arises that the injury was work-related. 33 U.S.C. s 920(a) (1976) ("Section 20 presumption"). Third, the employer then must present substantial evidence to rebut the work-relatedness of the injury; if he does, the presumption disappears. *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935). Fourth, if the presumption is rebutted, there still must be an evaluation of whether the evidence as a whole would justify a holding for the employer. *Parsons Corp. of California v. Director, Office of Workers' Compensation Programs*, 619 F.2d 38, 41 (9th Cir. 1980).

An "injury" is defined in § 902(2) of the Act as an "accidental injury... arising out of or in the course of employment." § 902(2). The Claimant must initially establish a *prima facie* case that he suffered an injury. To do so, he must show the suffering of an injury and a work-related accident occurred or that working conditions could have caused or aggravated that injury. *Kelaita v. Triple Machine Shop*, 13 BRBS 326, 330-331

(1981). *See, also, Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988); *Stevens v. Tacoma Boatbuilding Co*., 23 BRBS 191 (1990); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987).

Under these facts, it is undisputed that Claimant suffered an injury to his left knee at work on December 28, 2000. The Employer does not contest this occurrence and admits to liability for this injury under the LWCA. However, the Claimant asserts that the initial injury to his knee led to the subsequent injuries to his hip and back. The Employer contests that the work-related injury to Claimant's knee led to the other injuries. Instead, the Employer offers testimony and medical reports that propose the childhood injury and resultant leg shortening caused the back and hip conditions. Therefore, Claimant, having shown a work-related accident to the knee, must also show that the accident caused or could have caused the injuries suffered to his hip and back could have been caused by this accident to establish a *prima facie* case.

If a *prima facie* case of injury is established, the claimant is aided by a presumption pursuant to § 920(a) of the Act that the "injury arose out of and in the course of employment." *Kelaita, supra,* at 329-331; s*ee, also, Wheatley v. Alder*, 407 F. 2d 307, 312 (D.C. Cir. 1968). The burden then shifts to the employer to produce "substantial evidence to rebut the work-relatedness of the injury." *Volpe v. Northeast Marine Terminals, Inc.*, 671 F. 2d 697, 700 (2nd Cir. 1982), citing *Del Velcchio v. Bowers*, 296 U.S. 280, 285 (1935). After rebuttal of the presumption, the competent evidence must be considered as a whole to determine whether an injury has been established under the Act. *Id.*; *Volpe*, 671 F. 2d 700; *Cairns*, 21 BRBS 252 at 254.

Additionally, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition; the entire resultant disability is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). When a claimant sustains an injury at work, followed by the occurrence of a subsequent injury or aggravation outside work, the employer is liable for the entire disability if that subsequent injury is the natural, unavoidable result of the initial work injury. *Bludworth Shipyard v. Lira*, 700 F.2d 1046, 15 BRBS 120 (CRT). (5th Cir. 1983); *Hicks v. Pacific Marine & Supply Co.*, 14 BRBS 549 (1981).

Thus, if the disability results from the natural progression of an injury, and would have occurred notwithstanding the presence of a second injury, liability for the disability must be assumed by the employer or carrier for which the claimant was working when he was first injured; however, if the second injury aggravates the claimant's prior injury, thus further disabling claimant, the second injury is the compensable injury, and liability must be assumed by the employer or carrier for whom claimant was working when "reinjured." *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir**.** 1986) (*en banc*), *aff'g 15* BRBS 386 (1983); *Abbott v. Dillingham Marine & Mfg. Co.*, 14 BRBS 453 (1981), *aff'd mem. sub nom. Willamette Iron & Steel Co. v. OWCP*, 698 F.2d 1235 (9th Cir**.** 1982).

However, once an employer offers sufficient evidence to rebut the presumption that the injuries arose out of Claimant's employment, the presumption is overcome and it no longer controls the result. *Travelers Ins. Co. v. Belair*, 412 F.2d 297 (1st Cir. 1969); *John W. McGrath Corp. v. Hughes*, 264 F.2d 314 (2d Cir. 1956)., *cert. denied*, 360 U.S. 931 (1959); *see also Greenwood v. Army & Air Force Exch. Serv.*, 6 BRBS 365 (1977), *aff'd*, 585 F.2d 791, 9 BRBS 394 (5th Cir. 1978); *Gifford v. John T. Clark & Son, Inc.*, 4 BRBS 210 (1976); *Norat v. Universal Terminal & Stevedoring Corp.*, 3 BRBS 151 (1976). Therefore, the Section 20(a) presumption falls out of the case and the judge must then weigh all the evidence and resolve the case based on the record as a whole. *Swinton*, 554 F.2d 1075, 4 BRBS 466; *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). This is what is commonly referred to as the "bursting bubble" theory of the Section 20 (a) presumption. *Brennan v. Bethlehem Steel Corp.*, 7 BRBS 947 (1978).

Therefore, the undersigned must determine whether Claimant has shown by a preponderance of the evidence that the hip and back conditions and alleged aggravation of his degenerative disease causally relates to his employment with Employer. In attempting to meet this burden, Claimant is not entitled to the so-called "benefit of the doubt rule." *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994).[5]

Prima Facie Case

The Section 20(a) presumption applies in this case where the Claimant established a prima facie case. To establish this prima facie case, Mr. Turner need not affirmatively establish a connection between work and harm; rather, he met his burden by establishing only that:

(1) he sustained physical harm or pain, the knee injury; and,
(2) an accident occurred in the course of employment.

Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984). Since the Employer does not dispute these facts, the presumption created under Section 20(a) is that the employee's injury arose out of the employment. The burden now shifts to the Employer to establish that the Claimant's condition was not caused or aggravated by the employment. *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

Under these facts, the Claimant asserts, and the Employer concedes, that Mr. Turner suffered a work-related injury to his knee and that this injury arose out of his employment. Consequently, the Act covers this injury and the Claimant is entitled to benefits accordingly. However, Mr. Turner also seeks benefits for injuries he claims arose out of the initial knee injury and the Employer has offered evidence to rebut the

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5 The BRB held in *Holmes v. Universal Maritime Services Corp.*, 29 BRBS 18, 21 (1995), that "the Supreme Court's decision in *Greenwich Collieries* did not discuss or affect the law regarding invocation and rebuttal of the Section 20(a) presumption."

presumption under § 20(a) that Claimant's hip and back injuries did not arise out of Mr. Turner's employment or knee injury. Once the claimant has availed himself of the presumption, the burden then shifts to the Employer to rebut the presumption with substantial evidence. *James v. Pate Stevedoring Co.,* 22 BRBS 271 (1989). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982).

The Board has held that the § 920(a) presumption may be rebutted with evidence specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event to show that the claimant's condition was not caused or aggravated by the working conditions. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1083 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Thus, the relevant inquiry is whether the Employer's evidence can establish the lack of a causal connection between the Claimant's condition and his employment. *Dower v. General Dynamics Corp.,* 14 BRBS 324 (1981).

Three physicians, Drs. Cortina, Nettrour and Thomas, opined, in part, that degenerative changes arising from the deformed thighbone, stemming from the childhood fracture, caused the hip and back conditions and not the knee injury. The testimony of a physician that no relationship exists between an injury and the claimant's employment sufficiently rebuts the presumption. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). The opinions expressed by these physicians present evidence adequate to support the conclusion that the Claimant's hip and back condition may not be caused by the work-related injury. Once an employer offers sufficient evidence to rebut the presumption, this evidence overcomes the presumption and it no longer controls the result. *Travelers Ins. Co. v. Belair*, 412 F.2d 297 (1st Cir. 1969); *John W. McGrath Corp. v. Hughes*, 264 F.2d 314 (2d Cir. 1956), *cert. denied*, 360 U.S. 931 (1959); *see also Greenwood v. Army & Air Force Exch. Serv.*, 6 BRBS 365 (1977), *aff'd*, 585 F.2d 791, 9 BRBS 394 (5th Cir. 1978); *Gifford v. John T. Clark & Son, Inc.*, 4 BRBS 210 (1976); *Norat v. Universal Terminal & Stevedoring Corp.*, 3 BRBS 151 (1976).

I find that the Employer has sufficiently rebutted the Section 20(a) presumption and the burden shifts to the Claimant to show, by a preponderance of the evidence, that these conditions arose out of, or progressed naturally from, the covered knee injury. I must now weigh all the evidence and resolve the case based on the record as a whole. *Swinton*, 554 F.2d 1075, 4 BRBS 466; *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982).

Natural Progression or Aggravation

When a claimant sustains an injury at work, followed by the occurrence of a subsequent injury or aggravation outside work, the employer is liable for the entire disability if that subsequent injury is the natural, unavoidable result of the initial work injury. *Bludworth Shipyard v. Lira*, 700 F.2d 1046, 15 BRBS 120 (CRT). (5th Cir. 1983); *Hicks v. Pacific Marine & Supply Co.*, 14 BRBS 549 (1981). Although a preexisting condition

does not constitute an injury, aggravation of a preexisting condition does. *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701 (2d. Cir.1982). Additionally, the term "injury" includes aggravation of a pre-existing non-work related condition or the combination of work-related and non-work-related conditions. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990).

The Claimant suffered an initial leg injury as a child, which resulted in an abnormal leg length for which the Claimant compensated with shoe lifts. The Claimant then suffered an accident at work resulting in an injury requiring knee replacement surgery. It is Mr. Turner's position that this work-related knee injury caused his subsequent back and hip conditions or, in the alternative, that the knee injury aggravated his childhood fracture and that aggravation caused his hip and back problems. If a work-related injury aggravates, exacerbates, accelerates, contributes to, or combines with a previous infirmity, disease, or underlying condition, the entire resultant condition is compensable. *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986); *Laplante v. General Dynamics Corp./Elec. Boat Div.*, 15 BRBS 83 (1982).

In *Furlong v. O'Hearne*, the claimant suffered from a congenital condition, spinal bifida, which led to spondylolisthesis. 144 F. Supp. 266, 267 (D. MD. 1956), *aff'd per curiam*, 240 F.2d 958 (4th Cir. 1957); *see, also, Volpe v. Northeast Marine Terminals*, 671 F.2d 697 (2nd Cir. 1981). This condition caused no symptoms, including pain or stiffness, in his back or legs until the date of his work-related injury. *Id.* The work-related injury occurred when Claimant strained to lift some machinery at work and thereafter suffered pain in his back. The Court stated:

> [I]f a congenital condition of spina bifida and spondyliothesis, which has been asymptomatic and has not prevented the employee from working, is aggravated by the strain of heavy lifting, so that it becomes painful and prevents the employee from working, there has been an injury. Something has unexpectedly gone 'wrong in the human frame,' …there has been a 'change in any part of the system' which has produced harm or pain or a lessened facility of the natural use of any bodily activity or capability,'... A pre-existent but dormant condition has been 'aroused' … into a disasterous activity.' 144 F. Supp. at 270. (Internal citations excluded).

The Court found dispositive the evidence that the claimant's pain in his back came on shortly after the equipment lifting and had not bothered him before then, which is the case with Mr. Turner. *Id.* Most importantly, this Court determined that even where the injury would not have occurred, but for the physical condition of the claimant, the 'cause' of the injury is not the condition but merely a 'condition' that enabled the 'cause' to become operative. *Furlong* at 268. Furthermore, in ordering the award of benefits to Furlong, the Court noted:

> It is well settled that the fact that an employee is in a weakened or diseased condition does not bar his right to recover under workmen's compensation acts for accidental injury, even though, but for such weakened or diseased condition, the injury would not have occurred.

Thus, the rule of *Furlong* invites comparison of the asymptomatic state of Mr. Turner's back and hip spondyliothesis and degeneration with the similar condition of Mr. Furlong prior to his work related injury. Assuming that Employer's evidence is worthy of probative weight, Mr. Turner's pre-existing and asymptomatic degenerative condition does not sever the connection to the onset of pain in Mr. Turner's back and hip after altering his gait from the knee injury. Granted, the time periods are dissimilar: Mr. Furlong's back pain began immediately whereas Mr. Turner's arose sometime after unsuccessful knee treatment.

However, aggravation of a pre-existing condition qualifies as a compensable injury. The sum of evidence in this case, except for the opinion of Dr. Thomas and the equivocal opinion of Dr. Cortina, indicates that the knee incident caused, or at the least aggravated, Mr. Turner's hip and back. Where here, as in the *Furlong* case, the Claimant's pre-existing condition did not prevent him from performing his arduous job prior to the knee incident, then this rule from *Furlong* will apply if the credible, probative evidence warrants. Therefore, I must now determine which of the physicians' reports should be accorded probative weight on this issue.

When an injured employee seeks benefits under the Longshore and Harbor Workers' Compensation Act, a treating physician's opinion is entitled to "special" weight. *Amos v. Director, Office of Workers' Compensation Programs*, 153 F.3d 1051 (9th Cir. 1998); *See also, American Stevedoring Ltd. v. Marinelli*, 248 F.3d 54 (2nd Cir. 2001); Longshore and Harbor Workers' Compensation Act, §§ 1 *et seq*. Generally, the administrative law judge is entitled to give greater weight to the opinion of a treating physician than to that of non-treating physicians. *Morehead Marine Services, Inc. v. Washnock,* 135 F.3d 366 (6th Cir. 1998). However, the administrative law judge must apply substantial evidence, and "must examine the logic of [the parties'] conclusions and evaluate the evidence upon which their conclusions are based." *Director v. Newport News Shipbuilding & Dry Dock Co*., (*Carmines*), 138 F.3d 134, 140 (4th Cir. 1998). To be sufficient, the evidence must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971). (*quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 217, L.Ed. 126 (1938).).

Turning to the medical reports, I note that the reports of Drs. Meranda, Babins, Park, Rehmatullah and Farone[5] failed to address the cause of Mr. Turner's hip and back conditions and therefore, their opinions lack probative value here. Dr. Clunn and Dr. German both asserted that Claimant's injury aggravated the pre-existing injury. Dr.

5 Dr. Farone did note long-term compensatory changes in the left leg.

Nettrour prognosticated that although the knee did not present as a major contributing factor, he conceded that it did aggravate the hip and back situation. The knee injury and working conditions both relate causally to the hip and back conditions, according to Dr. Seeds. Dr. Thomas opined that the back and hip conditions occurred independently from the covered knee injury. Furthermore, he states that the hip and back are solely related to the degenerative conditions, specifically related to the shortened femur from the child-hood incident.

Dr. Blatt considered the back and hip condition "unrelated to" the knee injury, but granted that the knee injury and the effect of Claimant's shortened femur could have aggravated the hip and back pre-existing condition. Quoting from the Employer's Post-hearing brief regarding Dr. Blatt's deposition:

> Claimant's performance of heavy or medium manual labor "over the course of say 5 to 10 years" can aggravate the spondylolisthesis shown on the MRI films. It could also have a tendency to aggra-vate degenerative disc disease. p.10. The doctor suggested that the condition could have been related either to the initial injury or exacerbated by the surgery. p.11. (Employer's Post-Hearing Brief at p. 6).

Dr. Blatt also stated with regard to the synovial cysts in Claimant's back "During the course of care and treatment, they enlarged or became more prominent. p.25. The synovial cysts contributed to the nerve impingement." (Empl. Post-Hearing Brief at p. 7). This doctor felt that the length of employment would be a factor and that a lack of the 5 to 10 years of employment at the dock company would affect his opinion.

Employer asserts that this is an indication that Claimant's three years of employ-ment effectively negates the causal link based on Dr. Blatt's contention. The Employer argues:

> [A]s the Claimant only worked for the Employer three years prior to the injury in his second stint, the underlying basis for the opinions fail on that account as well. The Claimant did not have a five to ten-year, or seven to ten-year history of continued heavy employment. He had a three year history of medium duty employment. (Empl. Post-Hearing Brief at p. 25).

However, this line of reasoning is in error, is inaccurate and does not comport with the law. First, Dr. Blatt's testimony regarding "five to ten years of employment" relates to medium to hard manual labor not just labor performed for the Employer. Second, Claimant testified to working manual labor positions prior to his return to the Employer. It is solely within the judge's discretion to accept or reject all or any part of any testimony. *Perini Corp. v. Hyde*, 306 F. Supp. 1321, 1327 (D.R.I. 1969). The judge has discretion to accept all of the Claimant's assertions, or accept those that he considers

substantiated by other evidence.[6] I find that the Claimant is a credible witness, and find that his testimony at the formal hearing regarding his intervening employment at construction work, albeit less arduous than the work for Employer, is credible and supportive of the fact that Claimant performed at least medium manual labor during the time referenced by Dr. Blatt's response.

Consequently, I find that Mr. Turner did perform manual labor for the stated time sufficient to support Dr. Blatt's conclusions but not all with the Employer. Under the LWCA, the last employer to place the employee in a situation contributing to the Employee's "injury" must foot the entire bill. This "last employer" rule, judicially created, assigns full liability for an occupational injury resulting from damaging provocation even where more than one employer aggravated the claimant's condition. *Ronne*, 932 F.3d 836, 941 (9th Cir. 1991). Consequently, Employer's arguments that Dr. Blatt's testimony would change due to a lack of sufficient job exposure to result in aggravation of Claimant's pre-existing status does not prevail and Dr. Blatt's testimony is not refuted.

Where Dr. Blatt treated the Claimant specifically for his back and hip, where he conducted numerous objective tests as well as reviewed the objective testing of other physicians and where he opined that Claimant's condition was aggravated during the course of care or treatment and also that the performance of Mr. Turner's work could have aggravated his pre-existing conditions, I find this opinion to be well-reasoned and well-documented. Accordingly, I assign it probative weight in favor of a finding that the treatment and the work aggravated Claimant's hip and back conditions.

In Dr. German's opinion, which the Employer ordered as part of an independent examination for back and hip pain, the altered gait of the Claimant "certainly" caused the back pain from aggravation of pre-existing arthritis. (CX 11, 1-3). Furthermore, he believed blame for the altered gait lies with the knee injury and therefore, I find that this opinion supports a finding that the knee injury aggravated Claimant's pre-existing condition in his back and hip. Dr. German relied on objective test results, including several x-rays, and his examination findings. I accord it some weight where he documented his opinion with x-rays and the records reviewed, however, the record relied on contained no objective test results for the hip and back conditions.

The treating physician's, Dr. Clunn's, opinion appears well-documented and well-reasoned based on the extensive objective tests relied on, the frequency of office visits and the analysis utilized. A board-certified physician in physical and rehabilitative medicine, Dr. Clunn treated and evaluated Mr. Turner for his recurrent back and hip pain. She conducted the following objective tests in addition to her examination: deep tendon muscle strength, reflexes, muscle tone and bulk measurements, EMG and MRI review. (CX 36). In her opinion, the knee injury with resultant instability exacerbated the Claimant's underlying condition relating to his original childhood damage. (CX 36 – 12-13).

6 The Board will not interfere with credibility determinations made by an ALJ unless they are "inherently incredible and patently unreasonable." *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); Phillips v. *California Stevedore & Ballast Co.*, 9 BRBS 13 (1978).

Additionally, she opined that the work at P&C Dock either caused or aggravated Mr. Turner's spondyliothesis and the leg discrepancy did not account for his entire back problem. The September 6, 2002, EMG showed recent nerve damage which the doctor attributed to the knee trauma and surgery but not to the initial leg injury. (CX 18 – 13-14). I find that the duration of treatment, the objective testing and the well-reasoned opinion of Dr. Clunn warrants a grant of probative weight to her contentions that the work and the knee injury aggravation led to the hip and back conditions.

Dr. Cortina, another of Claimant's treating physicians, offered the opinion that the knee injury failed to relate to the subsequent hip and back circumstances in his letter to the Employer's case manager. However, in a later letter, he proffered a different opinion stating that the alteration in gait "aggravated some left hip arthrosis and also low-back arthrosis the patient had pre-existing the injury." (CX 5-35). Furthermore, Dr. Cortina stated that the knee injury and resultant "quad atrophy" increased the hyperextension deformity. The work conditions, described by Dr. Cortina as heavy and vigorous, probably aggravated the hip, knee, and back conditions in his opinion.

This statement again contradicts what this doctor stated to the Employer. In his final letter, Dr. Cortina's opinion supports a finding that the actual employment history and job duties indicate that his position at P&C Dock aggravated his back and hip status. Admittedly, the equivocality of Dr. Cortina's reports might suggest that his opinion merits less probative weight. However, the contradictory opinions stemmed from erroneous information concerning the total length of Mr. Turner's employment with P&C and the true nature of his job responsibilities. Once Dr. Cortina incorporated the correct information into his opinion, I find that he rehabilitated the previous inconsistencies. Further, I note that Dr. Cortina provided the most comprehensive and consistent treatment of Mr. Turner during the time after the accident and leading up to the multiple surgeries. Both he and Dr. Clunn observed the changes incident to his some 135 physical therapy treatments as well as the multiple objective test results and other physicians' opinions. Consequently, I find Dr. Cortina's final opinion offers probative, credible and well-documented evidence of the causal link between Mr. Turner's hip and back problems and his employment.

In Dr. Thomas' estimation, Mr. Turner's hip and back conditions are not caused or aggravated by the work-related knee injury or by the nature of work performed. The doctor opined that the degenerative changes in the spine and hip resulted from normal aging processes and found no evidence of an injury to the low back or hip resulting from the knee injury. Regarding Claimant's back, the doctor believed that x-rays taken from August 2001 to March 2002, would have evinced a change in the condition of the lumbar spine. The doctor also opined that the Claimant's work did not aggravate, exacerbate, or accelerate the pre-existing conditions in the lumbar spine and further, had the Claimant's work activities created cumulative trauma in his low back, it would have been reasonable to see symptoms in the hip and low back at the time of the knee injury. (EX 1-31). The fact that the Claimant expressly declined having symptoms in his back and hip at the time

of the December, 2000, injury would suggest that the Claimant's work activities did not cause or aggravate the pre-existing condition. (EX 1-32).

However, I note that the Employer stipulated to the infliction of cumulative, repetitious trauma on the Claimant from May 23, 1977 to August 1984 and from December 2, 1997 to December 28, 2000. In addition, Drs. Seeds, Clunn, and German all expressed the opinion that either the knee injury caused the hip and back conditions or it aggravated the existing degenerative conditions. Where a Claimant presents evidence of alternative causes of the injury, I need not elect between the two where either would support an award of benefits. *Contractors v. Pillsbury,* 150 F.2d 310 (9th Cir. 1945).

Therefore, I find that Dr. Thomas' opinion offered by Employer is insufficient to break either the connection between Claimant's work-related accident in which Claimant was injured and the subsequent hip and back aggravation or the working conditions and the subsequent hip and back aggravation. Irrespective of which theory prevails, that the work aggravated the hip and back or the knee injury did, the liability of the Employer remains the same.

Turning to the Employer's consultative report and deposition of Dr. Nettrour, the doctor indicated that the Claimant's awkward gait could have increased the pain and that the Claimant's manual labor could increase symptoms, but would not hasten a degenerative process. (EX 2, EX 5-52, 55 & 56). He believed him capable of light work only. (EX 2-15). Further, Dr. Nettrour believes the back and hip conditions relate to the degenerative states only and relation to the work injury or working conditions appears inconsistent with the x-ray changes. Additionally, the doctor doubted the Claimant's statements regarding a lack of prior symptoms asserting that the degeneration would have produced prior symptoms. However, Dr. Nettrour's opinion regarding Mr. Turner's condition pre-dates the knee and hip replacement surgery and the back surgery.

Consequently, his comments relating to the *temporary* worsening effect of the knee injury on the back and hip are without merit where he examined the Claimant before either of the replacement surgeries or the fusion surgery. Furthermore, Dr. Nettrour's contentions that the working conditions and injury did not "hasten" the degenerative process nor did they aggravate his condition, misconstrues the meaning of "aggravation" under the law. Showing that a claimant's employment aggravates the symptoms of the degenerative process suffices to meet the burden of causation. *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979).

To meet his burden of showing that aggravation of a pre-existing injury related to employment conditions or to a work-related injury, the Claimant need not show that the subsequent injury is directly attributable to the initial injury, in this case the knee injury. Instead, the Claimant need only show that the subsequent injury, to the back and hip, followed naturally or unavoidably from the knee injury. *Cyr v. Crescent Wharf & Wharehouse Co.*, 211 F.2d 454, 456-457 (9th Cir. 1954). In Dr. Nettrour's opinion, the initial accident to Mr. Turner's knee, "could have caused a temporary" uncomfortable feeling or pain to his hip and back. (EX 5-48). Dr. Nettrour agreed that alteration in gait caused by the work accident was a likely culprit in bringing pain to the previously

asymptomatic hip and back. (EX. 2-52). A temporary worsening effect equivalent to increased symptoms of pain equates to an aggravation under the law.

In *Furlon*g, the Claimant's pre-existing condition, aggravated by working conditions, created a painful condition preventing him from working. *Supra*. The Court equated this painful aggravation to a compensable injury under the LWCA. Likewise, in *Fargo v. Campbell Industries*, 9 BRBS 766 (1978), the Board affirmed an award of permanent total disability benefits where aggravation of an existing arthritic condition by work-related injury caused pain to the claimant. Thus, Dr. Nettrour's opinion that the knee-injury-caused symptoms of pain equates to an opinion that Claimant suffered an injury caused by his employment. Therefore, I find Dr. Nettrour's opinion to be somewhat probative in support of the causation issue despite his erroneous definition of the term "aggravation" and his lack of understanding regarding the definition of "injury" under the LWCA. He reviewed Claimant's history, work records, and objective tests to reach his conclusions. However, I do not assign any weight to his opinions of the "temporary" nature of Claimant's pain where his examination took place prior to the knee and hip replacements and the back fusion surgeries.

Dr. Seeds, board-certified surgeon and Mr. Turner's attending physician for the knee and hip conditions, testified to the presence of a degenerative process and arthritis in the left knee, low back and hip that was aggravated, exacerbated and hastened by Claimant's work at P&C Dock. He stated that any type of activity that puts significant demand on the joints, such as squatting, lifting and climbing has a direct correlation to increased degeneration of a joint that is in an arthritic process. (CX 38- 8-11). Consequently, he believed that the labor Mr. Turner performed aggravated or exacerbated the degenerative process in the knee saying "It absolutely affected the joint." (CX 38- 10 & 11). He also found that the December 28, 2000, work accident caused the impairment in the knee that ultimately required the total knee replacement. Dr. Seeds testified that the manual labor performed at P&C Dock would also have aggravated or exacerbated the condition in Claimant's back:

> It's just another form of repetitive motion, stress to a specific joint. Once the spine – once the mechanics of the spine have changed, it's the same kind of process. It is a continual process that, especially associated with other problems, you can even exacerbate or accelerate other problems. They circle around each other. If the mechanics of the knee are off, that can affect the mechanics of the hip and that can affect the mechanics of the back. It is all related. (CX38-13).

The Claimant, walking with an antalagic gait, certainly related to his knee but also related to his hip and his spine, aggravated the hip and back conditions. (CX 38-13 & 14). Dr. Seeds based his conclusions on his examinations, the surgical findings, the medical records of other physicians, and the work description for Claimant's position. I find his opinion to be well reasoned and well documented and accord it probative weight in

establishing the causal nexus between both Claimant's employment and his knee injury to the back and hip status.

After careful consideration of the record, I find that a preponderance of the evidence supports a causal nexus between Claimant's hip and back situation regardless of whether the work or the knee injury or both aggravated his pre-existing condition. While Dr. Nettrour may be correct in his opinion, and may be bolstered by Dr. Thomas' opinion, it cannot, however, be considered substantial evidence that Mr. Turner's employment is unrelated to the appearance of symptoms in the Claimant. In fact, the Claimant's treating physicians and surgeons all agreed that the back and hip conditions related by aggravation to Claimant's work. The Employer's pre-employment physician examined Claimant prior to his return to work in 1997 and noted no evidence of any back injury, hip problems, or even the leg shortening or limp. The uncontroverted testimony presented validates Claimant's assertion that his symptoms appeared post-injury and were non-existent until then. This evidence refutes the opinions offered by the Employer that the degenerative disease alone caused Claimant's back and hip conditions and pain.

The Nature, Extent, and Duration of the Claimant's Disability

Upon review of the medical evidence and testimony discussed in detail above, I find that the preponderance of such evidence proves that the Claimant suffered from a disabling physical injury caused by a work-related accident, which occurred on December 28, 2000. However, to determine benefits for the injuries, the nature, extent and duration of the Claimant's disability from this work-related injury must be assessed by examining wage earning capacity. The Employer paid temporary total benefits of $ 795.03 from December 29, 2000 to January 19, 2001 and March 7, 2001 to October 28, 2001 and November 9, 2001 to the present.

The Act defines disability as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability continues for a lengthy period and lasts for indefinitely, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp*., 400 F. 2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp*., 22 B.R.B.S. 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co*., 22 B.R.B.S. 155, 157 (1989).

The Claimant has the initial burden of proving total disability, as well as the burden of proving that the disability is permanent. *Eckley v. Fibrex and Shipping Co.*, 21 B.R.B.S. 120 (1998). To establish a *prima facie* case of total disability, the Claimant must prove by a preponderance of the evidence that he cannot return to his regular or usual employment due to his work-related injury. The Claimant need not establish that he cannot return to any employment, only that he cannot return to his usual employment. *Elliot v. C & P Tel. Co*., 16 B.R.B.S. 89 (1984). If the Claimant satisfies this burden, the

presumption exists that his disability is total. *Walker v. Sun Shipbuilding & Dry Dock Co. (Walker II)*, 19 B.R.B.S. 171 (1986).

"Usual" employment is the Claimant's regular duties at the time he was injured. *Ramirez v. Vessel Jeanne Lou, Inc.,* 14 B.R.B.S. 689 (1982). Even a minor physical impairment can establish total disability if it prevents the employee from performing his usual employment. *Elliot v. C & C Tel. Co*., 16 B.R.B.S. 89 (1984). Further, the Claimant's credible complaints of pain alone may be enough to meet his burden. *Anderson v. Todd Shipywards Corp*., 22 B.R.B.S. 20 (1989). On the other hand, a judge may find an employee able to do his usual work despite his complaints of pain, numbness, and weakness, when a physician finds no functional impairment. *Peterson v. Washington Metro. Area Transit Auth.,* 13 B.R.B.S. 337, 339 (1983).

The testimony of Claimant, his co-workers and supervisor uncontrovertedly established that the employment is medium to heavy and furthermore, that the lightest duty job in the yard entailed climbing, shoveling, sometimes working on the belts, inspecting the machinery, and using a fire hose. (CX 41-7 & 8). Claimant's regular job required twisting, heavy lifting, bending and climbing several hundred feet on conveyors. The job at P&C Dock Company was heavier and more vigorous than work he performed as a construction worker. (TR. 56).

The Claimant testified that his usual work included working on the equipment responsible for loading and unloading material to the ships, keeping coal from building up in the areas around the pits and the conveyor belts, repetitive sweeping of coal, breaking frozen coal apart with a six foot long pry bar and work with various size sledgehammers. Claimant also regularly used a three-inch diameter fire hose, maintained sixty-pound rollers, and manipulated thirty pound rail clamps. Other duties required him to be on his feet for eight hours or more, move fifty-five gallon drums and sledgehammer open dogs on rail car hopper doors. (TR. 26, 27, 28, 34, 35, 37, 41, 42, 43, 46).

Dr. Thomas did not believe the Claimant was able to return to his original employment. He understood that the work activities involved walking on uneven surfaces, climbing, and exposure to cold weather. He believed these would permanently disable him from his job, as after a replacement, the knee lacks the appropriate nerve endings or sensation to allow the leg to accommodate for the various conditions. p.44. He believed the Claimant had suffered a 30% impairment to the left leg under the AMA guidelines, Fifth Edition.

The doctor opined the Claimant had an excellent result from the hip surgery. He did not believe that the hip surgery would restrict him any further than the restrictions already based on the knee problem. He believed that the hip surgery had reached maximum medical improvement. However, it was too early to identify a date of maximum medical improvement for the lumbar spine. He would expect the spine would have improved by February 2004. The doctor also believed the Claimant was temporarily and totally disabled as a result of the recent lumbar surgery.

The doctor's work activity restriction was identified as Exhibit #2 to the deposition. It indicated the Claimant could perform full-time sedentary or light duty work. This restriction was only as to the left knee. However, the left hip condition would not alter the restrictions that would be imposed.

The Claimant continues to treat with Dr. Seeds. The knee and hip replacements are stable, but Mr. Turner is still recuperating from the spinal fusion. Claimant has to work on strength, conditioning and acclimating to a new type of mechanics and gait. (CX38-20). Dr. Seeds testified that Mr. Turner's physical condition must be viewed as a whole. Proper rehabilitation on the knee and hip will not be possible until the back condition reaches maximum medical improvement. This treating surgeon would not release the Claimant to return to his previous employment at P&C Dock. He places restrictions on bending, stooping, lifting, prolonged sitting and standing. (CX38-21). An AMA impairment rating could not be issued due to the incomplete rehabilitation of Mr. Turner's hip and back. (CX38-22). Dr. Seeds stated:

> As I indicated before, it is his ability to continue adjusting to all these factors together. We have changed the way he walks, we have changed the mechanics of the way he walks, we changed the length of his leg, we changed the mechanics of his spine. So all those things together make it a complex issue. (CX38-37)

I find that the Claimant has established a *prima facie* case of total disability prior to MMI. The Claimant's complaints of pain are credible and consistent during the period, prohibiting him from returning to his former usual employment. In addition, the preponderance of the medical opinion evidence concurs with the assessment that Claimant is totally disabled from performing his former medium to heavy manual labor position. The parties also stipulated that at the time of the hearing and only three months post-surgery, the Claimant was unable to return to his former position while completing recovery from the back fusion surgery.

After a Claimant makes this prima facie showing, and due to the stipulation of the parties, the burden shifts to the employer to show suitable alternate employment. *Clophus v. Amoco Prod. Co*., 21 B.R.B.S. 261 (1988). A failure to prove suitable alternative employment results in a finding of total disability. *Manigault v. Stevens Shipping Co*., 22 B.R.B.S. 332 (1989); *MacDonald v. Trailer Marine Trans. Corp*., 18 B.R.B.S. (1986), *aff'd*, (No. 86-3444)(11th Cir. 1987)(unpub.). As Claimant has met his burden of proving the nature and extent of his disability and his inability to return to work, the next question is whether Employer produced sufficient evidence to reduce Claimant's disability status from total to partial.

An employer can establish suitable alternate employment by offering an injured employee a light duty job tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. *Walker v. Sun Shipbuilding and Dry Dock Co.*, 19 BRBS 171 (1986); *Darden v. Newport News Shipbuilding and Dry Dock Co.*, 18 BRBS 224 (1986). Claimant must cooperate with

Employer's re-employment efforts and if Employer establishes the availability of suitable alternate job opportunities, I must consider Claimant's willingness to work. *Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner*, 731 F.2d 199 (4th Cir. 1984); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687 (5th Cir. 1986).

The standards for determining total disability are the same regardless of whether temporary or permanent disability is claimed. *Bell v. Volpe/Head Construction Co.,* 11 B.R.B.S. 377 (1979). The degree of the Claimant's disability, *i.e*. total or partial, is determined not only on the basis of physical condition, but also on other factors, such as age, education, employment history, rehabilitative potential, and the availability of work. Thus, it is possible under the Act for a Claimant to be deemed totally disabled even though he may be physically capable of performing certain kinds of employment. *New Orleans (Gulfwide) Stevedore v. Turner*, 661 F. 2d 1031, 1038 (5th Cir. 1981).

The Employer has failed to provide any evidence that suitable alternate employment is available to the Claimant[7] and the record reflects that on the two occasions when Mr. Turner attempted to perform sedentary or light work at P&C Dock Company, his knee instability prevented him from doing so due to the uneven pavement there. Additionally, the physicians who expressed post-surgical opinions believed that the knee injury alone precluded Mr. Turner from returning to his former employment. Dr. Seeds, for example, testified that Mr. Turner could perform sedentary work that permitted some minimal movement to avoid stiffening joints. (Depo. p. 35). To the contrary, on April 2003, Dr. Thomas made a determination of Mr. Turner's capabilities to perform sedentary to light work. (EX 1-7). However, at that time, Mr. Turner still wore his "clam shell" brace from the back fusion surgery and would continue to do so for another three months according to Dr. Turner. Consequently, I do not find his opinions of the Claimant's physical cap-abilities probative where he had not fully recovered from his surgery.

In sum, I find that Claimant established his total disability by the medical evidence and the Employer failed to carry its burden of showing suitable alternative employment.

Maximum Medical Improvement

The determination of when maximum medical improvement ("MMI") is reached is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 B.R.B.S. 248 (1988). An administrative law judge must make a specific factual finding regarding MMI and cannot merely use the date when temporary total disability is cut off by statute. *Thompson v. Quinton Eng'rs*, 14 B.R.B.S. 395, 401 (1981). Where the medical evidence indicates that the injured workers' condition is improving and the treating physician anticipates further improvement in the future, it is

7 The Employer's Pre-hearing report lists a vocational expert as a potential witness but no testimony or exhibits appear in the record.

not reasonable for an administrative law judge to find that MMI has been reached. *Dixon v. John J. McMullen & Assocs*., 19 B.R.B.S. 246, 245 (1986).

A residual disability, partial or total, will be considered permanent if, and when, the employee's condition reaches the point of maximum medical improvement (MMI). *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989; *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985). Only payments by employers made for permanent disability are credited against the 104-week obligation for purposes of contribution by the Special Fund under § 8(f) of the LHWCA. See 33 U.S.C. § 908(f). Where the treating physician stated that surgery might be necessary in the future and that the claimant should be reevaluated in several months to check for improvement, it was reasonable for the administrative law judge to conclude that the claimant's condition was temporary rather than permanent. *Dorsey v. Cooper Stevedoring Co*., 18 BRBS 25, 32 (1986), *pet. dismissed sub nom. Cooper Stevedoring Co. v. Director, OWCP*, 826 F.2d 1011 (11th Cir. 1987). Where no physician concludes that a claimant's condition has reached maximum medical improvement and further surgery is anticipated, permanency is not demonstrated. *Kuhn v. Associated Press,* 16 BRBS 46, 48 (1983).

Under these facts, the physicians offering an opinion as to Claimant's maximum medical improvement status have opined that the back situation would take at least one year to reach maximum improvement and, until resolution of the back and the hip, complete knee rehabilitation may not be possible. No physicians opined that Claimant attained maximum medical improvement except for one physician, Dr. Thomas, as to the knee. (EX 1-13). Consequently, I find that Claimant has not attained maximum medical improvement and therefore, I find that the disability of Mr. Turner is temporary.

Past and Future Medical Benefits Pursuant to Section 7

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

A claimant establishes a prima facie case for compensable medical treatment where a qualified physician indicates a work-related condition necessitates treatment. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). In order to assess a medical expense against the employer, the expense must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). The employer is only liable, however, for the reasonable value of medical services. *See* 20 C.F.R. § 702.413; *Bulone v. Universal Terminal & Stevedoring Corp.*, 8 BRBS 515, 518 (1978); *Potenza v. United Terminals, Inc.*, 1 BRBS 150 (1974), *aff'd* 524 F.2d 1136, 3 BRBS 51 (2nd Cir. 1975).

The Employer paid for the knee replacement surgery but contests liability for the hip replacement and back surgery. However, the Employer presents no arguments regarding the necessity or reasonableness of the back and hip surgeries. The employer must raise the reasonableness and necessity of treatment before the judge. *Salusky v. Army Air Force Exch. Serv.*, 3 BRBS 22 (1975). It is the claimant's burden to establish the necessity of treatment rendered for his work-related injury and Mr. Turner met his burden by credible medical evidence where the opining physicians agreed that these surgeries were medically indicated. *See, generally, Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). Treatment is compensable even though it is due only partly for a work-related condition and thus, arguments related to the degenerative nature of Mr. Turner's hip and back are inapplicable. *Turner* v. *Chesapeake & Potomac Tel. Co.,* 16 BRBS 255, 258 (1984).

I must therefore, evaluate the medical evidence to determine if these procedures were necessary but make no findings against their reasonableness where the charges have not been challenged by the Employer. *Salusky, supra.* The Rules of Procedure under the Act specify:

> (2) Complaints. Any respondent contesting any material fact alleged in a complaint, or contending that the amount of a proposed penalty or award is excessive or inappropriate or contending that he or she is entitled to judgment as a matter of law, shall file an answer in writing.
>
> An answer shall include:
>
> (i) A statement that the respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny each allegation; a statement of lack of information shall have the effect of a denial; any allegation not expressly denied shall be deemed to be admitted;
> (ii) A statement of the facts supporting each affirmative defense.

5 U.S.C. 301 (1994). Consequently, the Employer's mere contest of the issue of medical benefits does not equate to an argument in support of its position and does not amount to an answer to the Claimant's request for these benefits. The claimant asserted in his pre-hearing brief the issue of medical benefit entitlement so Employer had every opportunity to present an argument in opposition to this award but failed to do so.

Turning to the facts, the Claimant underwent a complete hip replacement surgery and back surgery consisting of L4 and L5 laminectomy with removal of abnormal facet and bilateral foraminotomies, pedicle screw instrumentation, L4/5, S1, lateral fusion L4/5, S1, harvest of right iliac crest bone graft and stealth image guidance. The record presents uncontroverted evidence from the medical professionals, including Drs. Thomas (EX 4-35), Seeds (CX 14-17 & 18, CX 38), Clunn (CX 36 – 20-21), and Blatt (CX 20-

14), that Mr. Turner's surgeries were medically necessary. The Employer presents no evidence of unreasonable or unnecessary treatments.

Consequently, I find the Claimant's treatments related to the hip and back are compensable under the Act. The Employer shall furnish such medical, surgical, and other attendance or treatment as Claimant's temporary total disability may require in accordance with § 907. In addition, the Employer shall be responsible for Claimant's medical treatment expenses already incurred, specifically including the costs of the hip replacement, back surgery, and attendant physical therapies, and including his costs of transportation. 20 C.F.R. § 702.401(a); *Tough v. General Dynamics Corp.*, 22 BRBS 356 (1989).

Entitlement to Section 8(f). Relief

The Employer moves this Court for relief under Section 8(f) of the Act. The LHWCA is a federal workers' compensation statute that establishes disability benefits for maritime workers injured on the job. *Ceres Marine Terminal v. Director, OWCP,* 118 F.3d 387, 388-89 (5th Cir.1997). Under general workers' compensation law, employers are liable for the full costs of a worker's disability, even if the disability is the result of both a pre-existing impairment and a current employment injury; this is known as the "aggravation rule." 782 F.2d 513, 517 (5th Cir.1986) (*en banc*).

Because the aggravation rule threatens employers with greater liability for injuries to employees with pre-existing medical conditions, Congress passed section 908(f) of the LHWCA. Section 908(f) limits the amount of workers' compensation for which an employer is responsible. The section provides that, where an employee had an "existing permanent partial disability" that contributed to the current injury, the employer is only responsible for the first 104 weeks of the injured employee's compensation. 33 U.S.C. § 908(f). After that 104 weeks, the employee is paid from a "second injury fund" or "special fund," financed by members of the industries covered by the LHWCA. 33 U.S.C. § 944.

To be entitled to special fund relief under § 908(f) the employer must establish that the employee seeking compensation had:

> (1) An "existing permanent partial disability" before the employment injury;
>
> (2) that the permanent, partial disability was "manifest" to the employer;
>
> (3) that the current disability is not due solely to the employment injury; and
>
> (4) that the current permanent, partial disability "is materially and substantially greater than that which would have resulted from the subsequent injury alone."

Two R Drilling Co. v. Director, OWCP, 894 F.2d 748, 750 (5th Cir.1990); 33 U.S.C. § 908(f)(1). These requirements assure that employers receive special fund relief only where the employer would be responsible for the marginal increase in liability caused by the claimant's pre-existing condition. *Id.* Relief is not available for temporary disability, no matter how severe. *Jenkins v. Kaiser Aluminum & Chem. Sales*, 17 BRBS 183, 187 (1985).

However, Section 8(f)(3) of the Act also requires an employer to present a request for Section 8(f) relief to the district director prior to his consideration of the claim. "Fail-re to present such request prior to such consideration shall be an absolute defense to the special fund's liability . . ., unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order." 33 U.S.C. § 908(f)(3).

According to the District Director's Motion in Limine, the Employer failed to submit this request. Additionally I note that nothing in the record establishes that the Claimant suffered from a pre-existing partial disability and nothing establishes that the pre-existing condition was manifest to the Employer. In fact, the record reflects the opposite. Claimant and his former co-workers all testified that he suffered from no back or hip pain prior to the December 2000, accident. The Employer offers no evidence to refute this testimony. Further, Claimant testified, and the Employer did not controvert, that a complete physical occurred prior to Mr. Turner's return to employment with P&C Dock Company in 1997. The examination "cleared" Claimant for his heavy, or at the least, medium manual labor job. In addition, the testimony of Mr. Turner's co-workers and supervisor provides evidence that Claimant did not miss any work due to his pre-existing condition and therefore, it was not disabling. As such, Section 8(f) relief is not available to P&C Dock under 33 U.S.C. § 908(f)(3) or under the elements and the request for relief is denied.

Credit for Medical Expenses

The Employer and the Claimant contest the issue of a credit for medical expenses. (JX 1). The "Credit Doctrine" under the LHWCA limits and reduces a worker's recovery in aggravation cases. Where another source compensates an employee for expenses, that amount may offset and prevent a double recovery for those expenses. *New Haven Terminal Corp. v. Lake*, 337 F.3d 261, 268-269 (2nd Cir. 2003). In *New Haven Terminal Corp. v. Lake*, the employer argued in favor of a credit against their liability for causing aggravation of a pre-existing injury. *Id.* at 267-268. Under the credit doctrine, compen-sation from someone else for the same injury offsets the recovery due for an aggravated injury. *Id.* at 269.

This doctrine is inapplicable to these facts because no other covered employer contributed to the aggravation of Mr. Turner's injury nor did the work-related injury occur while employed elsewhere. Additionally, I note that Employer failed to address this issue in its brief or at the hearing as discussed, *supra*. No evidence appears or sup-

ports the offset of any recovery for Mr. Turner and no third-party insurer joined in this action. Therefore, I find that this issue is unsupported by the record and the request by Employer fails.

Attorney Fees

The claimant moves for an award of attorney's fees for Claimant's legal representation in this matter. Supporting documentation attached to Claimant's Motion for an Award of Attorney Fees reveals a request for $33,005.04 in fees and litigation expenses for 150.1 hours of attorney time.

The claimant's attorney, Steven C. Schletker, "Petitioner", having successfully prosecuted this claim, is entitled to a fee assessed against the Employer. Petitioner filed a fee application on September 16, 2003, concerning services rendered and costs incurred in representing Claimant between October 9, 2002, and September 15, 2003. Petitioner seeks a fee of $33,005.04(including expenses) based on 150.1 hours of attorney time at $150.00 per hour.

The Employer moved to hold this issue in abeyance until resolution of the liability issues. Consequently, I will enter a Supplemental Order on this issue after the Employer submits its brief in response to the Petitioner's Motion. The Employer has twenty-one days from the date of this order to submit its brief.

Interest

Although not specifically authorized under the Act, it has been an accepted practice that interest is assessed on all past due compensation payments. *Avalone v. Todd Shipyards Corp.*, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits, including medical benefits, to ensure that the employee receives the full amount of compensation due. *Newport News Shipbuilding & Dry Dock Co.*, 594 F.2d 986 (4th Cir. 1979); *Smith v. Ingalls Shipbuilding*, 22 BRBS 46, 50 (1989). Therefore, the District Director shall determine and assess the appropriate rate of interest on the medical bills and attorney fees as of the date of filing of this Decision and Order with the District Director in accordance 28 U.S.C. § 1961 (1982).

ORDER

Based on the foregoing findings of fact, conclusions of law, and upon the entire record, I make the following compensation Order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is hereby ORDERED that,

1. P&C Dock shall pay any outstanding medical bills of the Claimant, Glen Turner, relating to the December 28, 2000 knee accident and shall continue to furnish reasonable, appropriate, and necessary medical care and treatment for the Claimant's work-related injuries, as required by § 7 of the Act,

2. P&C Dock shall pay the medical bills of Glen Turner relating to the hip replacement surgery and back fusion surgery as described above and to the subsequent rehabilitative treatments relating to those conditions;

3. P&C Dock shall provide reasonable, appropriate, and necessary disability compensation until such time as the Claimant is determined to have reached maximum medical improvement; based on the Claimant's average weekly wage of $1,197.06 and in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(b).

A

JOSEPH E. KANE
Administrative Law Judge